

ORIGINAL

Before the
COPYRIGHT ROYALTY TRIBUNAL
Washington, D.C.

JAN 10 1990

In the Matter of:

1987 Cable Royalty
Distribution Proceeding

CRT Docket No. 89-2-87CD
(Phase II)

REBUTTAL CASE OF
BROADCAST MUSIC, INC.

January 10, 1990

"COPYRIGHT ROYALTY TRIBUNAL"

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BROADCAST MUSIC, INC.

Broadcast Music, Inc. ("BMI") hereby submits its
Rebuttal Case in Phase II of the 1987 Cable Royalty
Distribution Proceeding. Included is the testimony of
three witnesses, together with related exhibits.

Respectfully submitted,

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January 10, 1990

TABLE OF CONTENTS

DESIGNATION OF PAST RECORDS

TESTIMONY

<u>Witness</u>	<u>Tab</u>
Alan H. Smith	A
David E. Black	B
Marvin L. Berenson	C

EXHIBITS

<u>Number</u>	<u>Title</u>	<u>Witness</u>
B-15R	"Movie Producers" Episode from National Public Radio's "Morning Edition" Program, Air Date July 12, 1988	Smith
B-16R	Videotape of Film Excerpts Containing Background Music by BMI Composers	Smith
B-17R	CNN Headline News Cue Sheet/1987	Smith
B-18R	Cue Sheets for "100% ASCAP" Programs	Smith
B-19R	ASCAP Cue Sheets Showing Deleted BMI Music	Smith
B-20R	Order to Show Cause for Special Distribution of ASCAP Royalties	Black
B-21R	1987 Local Radio Blanket License Rates - Percentage of Net Revenues	Berenson

<u>Number</u>	<u>Title</u>	<u>Witness</u>
B-22R	1987 Network Television Rates (CBS, ABC and NBC)	Berenson
B-23R	1987 Home Box Office Rates (per subscriber)	Berenson
B-24R	Country Music Television Rates - Percentage of Net Revenues	Berenson
B-25R	1987 Nashville Network Rates	Berenson
B-26R	Internal Memorandum of the Department of Justice, dated November 22, 1966	Berenson
B-27R	Comparison of Total License Fees	Berenson
B-28R	Oscars, Grammys and Pulitzer Prizes	Berenson
B-29R	Music in the 37 Top Syndicated Programs Ranked by the A.C. Nielsen Co. November 1987 Cassandra Report	Berenson

DESIGNATION OF PAST RECORDS

1984 Cable Royalty Distribution Proceeding
(Docket No. CRT 85-4-84CD)

- Phase II Direct Case of the Music Claimants,
dated September 29, 1986.

1983 Cable Royalty Distribution Proceeding
(Docket No. CRT 84-1-83CD)

- Written direct testimony of Earle Hagen in
Direct Case of Music Claimants, Tab C, dated
May 13, 1985.
- Written direct testimony of Frank Lewin in
Direct Case of Music Claimants, Tab D, dated
May 13, 1985.

1980 Cable Royalty Distribution Proceeding
(Docket No. CRT 81-1)

- Oral testimony of Earle Hagen, Tr. at 2510-2531,
dated October 27, 1982.

REBUTTAL TESTIMONY OF ALAN H. SMITH

Mr. Chairman, Commissioner Aguero, my name is Alan H. Smith. I am Vice President, Research and Information, of Broadcast Music, Inc. ("BMI"), and my background and qualifications were listed in my testimony in the direct phase of this proceeding. The purpose of my rebuttal testimony today is to offer several reasons why the ASCAP surveys of music on television do not reflect actual music use on distant television signals in 1987, and therefore do not provide a reliable basis for Tribunal decision-making. A summary of these reasons follows:

First, the abstract credits which form the basis of all four surveys give undue weight to feature music. Second, the abstract credits incorporate irrelevant performance data of prior years. Third, the surveys are an incomplete reflection of music use on the stations and programs surveyed by ASCAP. Fourth, the ASCAP surveys misappropriate or disregard music that is in the BMI repertoire. Fifth, some percentage of the credits in ASCAP's 53 station survey reflect local advertising and public service announcements for which there is little or no interest in the distant cable community. Sixth, ASCAP's alleged music census of WTBS is of highly ques-

tionable value because WTBS's programming is not representative of the programming of the other distant signal stations. Seventh, the ASCAP surveys fail to take into account the different considerations applicable to the Syndex Fund. I will discuss each reason in turn.

I. The ASCAP Surveys Do Not Reflect Actual Music Use.

A. The Surveys Give Excessive Weight to Feature Music for Reasons That, If at All Appropriate, Are Only So In the Context of ASCAP's Distribution To Its Own Members. ASCAP's weighting rules give feature songs higher weights than background or theme works. Specifically, feature works receive a value of one credit, while background and theme works receive small percentages of a credit.

In several proceedings before this Tribunal, ASCAP and BMI have demonstrated the importance of background music to the success of film and television programming. From my own experience, too, as a former TV producer, I can also testify to the overriding contribution of background music to the mood, clarity and drama and even storyline of television programming.

In an entirely different venue, ASCAP itself has extolled the significance of background music in films. Exhibit No. B-15R is a tape of a report aired by the

National Public Radio's Morning Edition on July 12, 1988. The program covered a seminar sponsored by ASCAP on the overwhelming importance of background music to film. BMI Exhibit No. B-16R is a videotape of clips of movies containing background music by BMI composers; it further illustrates the overwhelming importance of background music to films.

B. The Abstract Credits Are Based on Considerations That Were Irrelevant to Music Users in 1987. ASCAP's direct case reveals that knowledge of the prior performance history of each feature, background and theme work (accounting for the overwhelming majority of the works in the ASCAP surveys) is essential to calculate the full credit value for the work in question. Performances prior to 1987 were irrelevant to music users in 1987, however, as Dr. Boyle himself testified. Furthermore, ASCAP has made no showing that it has the historic survey data on non-ASCAP works required by its weighting rules for appropriate crediting of such works.

Prior performance history is one way that the ASCAP crediting rules favor certain ASCAP members over others. While there may be internal reasons for this practice, it is irrelevant to the marketplace considerations faced by

music users in 1987. In the same way, the use of BMI's distribution system would have also been irrelevant, because it too incorporates bonus factors that have no relevance to the market between music users and owners in 1987.

Basically, these factors generally reflect the competition among ASCAP and BMI for writers and publishers, as well as various equitable considerations that come into play within a given group of writers or publishers. For example, when, for various internal reasons, ASCAP doubled its rate for local television theme music in mid-1987 (from 10% of a credit to 20% of a credit), I believe it was done to address a perceived weakness in the ASCAP repertoire within the television marketplace. Specifically, the increase was designed to attract writers of television theme music. In any event, the credit change had nothing to do with the performance of music in 1987.

C. The Surveys Are an Incomplete Reflection of Actual Music Use. ASCAP's direct case reveals that in computing abstract credits for a program's music, ASCAP employees simply ignored music that for whatever reason they thought was in the public domain. In addition, ASCAP's surveys also disregarded music considered to be

"indistinguishable" (i.e., unrecognizable). Thus, an indeterminant, but in my view significant, portion of music on television is simply ignored, and the credits thus do not reflect a substantial portion of the total music on television programs surveyed.

As only one example, ASCAP credits itself in Exhibit No. 10 with 100% of the music on CNN Headline News. On cross-examination, BMI introduced the cue sheet for that program as Exhibit No. X-6, which shows that its theme, used for six minutes within each full program, is licensed by BMI. The identical cue sheet used in 1987 is reproduced here as Exhibit No. B-17R. ASCAP employees, listening to a tape of CNN Headline News, evidently ignored the theme because they found it to be unrecognizable.

We can be reasonably certain that there were many more instances where BMI music was similarly ignored, because ASCAP incorrectly considered it to be either in the public domain or else unrecognizable. I say this because in my experience most background music with no life outside a specific film or program is almost impossible to recognize from video and audio tapes without the use of cue sheets, no matter how expert the listener may be. For the music program Nighttracks, which follows the popular music charts, ASCAP's employees listened to tapes

and awarded ASCAP the majority of the music. The charts generally contain an equal number of BMI and ASCAP works, however. In my view, there is no basis in the record for awarding a majority of that program to ASCAP. In summary, I believe that the incompleteness of ASCAP's surveys subjects them to methodological question.

D. The ASCAP Surveys Misappropriate or Disregard Music That Is In the BMI Repertoire. ASCAP's WTBS surveys credit ASCAP with 100% of the credits in many of the shows listed. Some of the works in these shows were "split works." Split works are co-licensed by BMI and ASCAP, such as where a work is co-written by a BMI writer and an ASCAP writer. At the end of each of the ASCAP exhibits a very modest lump sum adjustment for split works does appear. However, there is no way of determining which works on which shows have been "split," or whether the adjustments have been properly made.

Moreover, as Exhibit No. B-18R demonstrates, certain of the works within many of the programs appearing in ASCAP's Exhibit No. 10 as "100% ASCAP" were licensed in whole by BMI in 1987. This exhibit contains the cue sheets for 14 programs in which ASCAP claims 100% of the music, but which contain certain works wholly licensed by

BMI. Since the split works adjustment cannot account for a work wholly licensed by BMI, ASCAP's claims of 100% ownership for these programs as shown in their exhibits are inaccurate.

In yet another instance of this, ASCAP credits itself with 100% of the film Moulin Rouge, despite the fact that BMI licenses "The Song from Moulin Rouge," one of the most popular songs in BMI's repertoire. In many other instances the ASCAP survey may also be crediting ASCAP with BMI music. Exhibit No. B-19R shows cue sheets for seven programs provided by ASCAP, in which all or most of the BMI music has simply been crossed off and thus not accounted for in ASCAP's surveys. In short, ASCAP's practice of eliminating BMI music from its surveys subjects these surveys to methodological question.

E. The 53 Station Survey Represents Local Programming of No Value to a Distant Audience. An unknown but certainly measurable quantity of the total abstract credits in the 53 station survey represents commercial jingles and public service announcements. Local ads and announcements, however, are generally of no interest to distant signal audiences and are thus of no value to the cable system carrying the signal. Any abstract credits

for those works in the 53 station survey are irrelevant and should be disregarded.^{1/}

F. The WTBS "Census" Is Not Representative of Programming on Distant Signals. The programming on WTBS is different from the programming on the other distant signals because WTBS uses a disproportionately high share of movies. Turner Broadcasting Co. purchased the MGM film library in mid-1986 to further strengthen this unique aspect of WTBS's programming.

Thus, even if a survey of music use of one station were a valid basis for allocation of the fund, which I doubt, ASCAP's selection of WTBS for its "census" renders Exhibits No. 10, 11 and 12 useless for the purpose for which ASCAP urges the Tribunal to use them.

G. The Surveys Do Not Take the Syndex Fund Into Account. As I testified in the direct phase of this proceeding, different considerations apply to the Syndex Fund, which represents 20% of the royalties at issue. As a matter of law, the FCC's syndicated exclusivity rules

1 Cf. BMI Exhibit No. X-2, ASCAP Letter dated November 14, 1989, at p. 2. This letter shows that feature, background and theme music accounts for approximately 80% of all credits in Exhibits Nos. 6 and 7. Some portion of the remaining credits must be for jingles and announcements.

applied to duplication of both movies and syndicated television programs prior to the repeal of the rules. Thus, from a legal standpoint, the Syndex surcharge in Section 308.2 of the Tribunal's rules covers both types of programming.

However, the evidence submitted to the FCC for the year 1987 indicates that as a matter of fact the majority of concerns about program duplication involved syndicated television programming only, and not films. ASCAP's surveys, using music performances on films, fail to take into account BMI's preponderant position with respect to music on syndicated television programming.

II. Conclusion.

In conclusion, I believe that for many reasons ASCAP's surveys do not reflect actual music use in 1987, and thus provide a highly unreliable basis for the Tribunal's decision in this proceeding. The abstract crediting mechanism contains many irrelevant factors, and ASCAP's methodology alternately ignores BMI music or credits it as ASCAP music. These surveys should not be relied upon by the Tribunal in reaching its final determination in this proceeding.

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Docket No. 89-2-87CD
Phase II

Affidavit

I, Alan H. Smith, declare under penalty of perjury
that the foregoing testimony is true and correct. Exe-
cuted on January 5, 1990.



Alan H. Smith

Exhibit No. B-15R

"Movie Producers" Episode
from National Public Radio's
"Morning Edition" Program,
Air date July 12, 1988

/

Exhibit No. B-16R

Videotape of Film Excerpts Containing
Background Music by BMI Composers

CABLE NEWS NETWORK, INC. ("CNN")
PRODUCTION MUSIC CUE SHEET

PAGE #: 1 OF 1 /cha
FOR THE YEAR OF: 1987

PRODUCTION TITLE: CNN Headline News Theme

PRODUCTION COMPANY: Cable News Network, Inc.

PROGRAM TYPE: Half Hour (1/2) News and Information Programming

FIRST AIR DATE: August 15, 1983 / Copyright 1983 Super Satellite Music

SEGMT or CUE NO.	MUSIC TITLE (COMPOSITION)	COMPOSER & AFFILIATION	%	PUBLISHER & (AFFILIATION)	%	TIMING (min/sec)	USAGE (TYPE)
N/A	CNN Headline News (Intro)	Robert A. Israel (BMI)	100	Super Satellite Music (BMI)	100	:05	Intro
N/A	CNN Headline Theme (Cue Tone)	Robert A. Israel (BMI)	100	Super Satellite Music (BMI)	100	:10	Cue Tone
N/A	CNN Headline Theme (Bumper)	Robert A. Israel (BMI)	100	Super Satellite Music (BMI)	100	:20	Bumper
N/A	CNN Headline Theme (Sports)	Robert A. Israel (BMI)	100	Super Satellite Music (BMI)	100	1:00	Sports
N/A	CNN Headline Theme (Bumper)	Robert A. Israel (BMI)	100	Super Satellite Music (BMI)	100	:20	Bumper
N/A	CNN Headline Theme (Hollywood)	Robert A. Israel (BMI)	100	Super Satellite Music (BMI)	100	1:00	Hollywood
N/A	CNN Headline Theme (Bumper)	Robert A. Israel (BMI)	100	Super Satellite Music (BMI)	100	:20	Bumper
N/A	CNN Headline Theme (News)	Robert A. Israel (BMI)	100	Super Satellite Music (BMI)	100	1:00	News
N/A	CNN Headline Theme (Bumper)	Robert A. Israel (BMI)	100	Super Satellite Music (BMI)	100	:20	Bumper
N/A	CNN Headline Theme (Financial)	Robert A. Israel (BMI)	100	Super Satellite Music (BMI)	100	1:00	Financial
N/A	CNN Headline Theme (Bumper)	Robert A. Israel (BMI)	100	Super Satellite Music (BMI)	100	:20	Bumper
N/A	CNN Headline Theme (ID)	Robert A. Israel (BMI)	100	Super Satellite Music (BMI)	100	:05	ID

MARY WILLIAMS MUSIC CLEARANCE COMPANY
MUSIC CUE SHEET

MUSIC
CLEARANCE
COMPANY
6223 SELMA AVE.
HOLLYWOOD, CAL. 90028
(213) 462-6575

CCT 1 - 1983

PRODUCER: DOTY-DAYTON

FEATURE LENGTH MOTION PICTURE
(THEATRIC & TV FILM RELEASE)

TITLE: "AGAINST A CROOKED SKY"

COMPOSITION	PUBLISHER OR RIGHTS SECURED FROM		USAGE
	Composer	Publisher	
MAIN TITLE	ALEXIS K. DE AZEVEDO	AZEVEDO MUSIC/BMI	INSTR BG 2:53
THE WARRIOR	ALEXIS K. DE AZEVEDO	AZEVEDO MUSIC/BMI	INSTR BG :13
CHARLOTTE'S THEME	ALEXIS K. DE AZEVEDO	AZEVEDO MUSIC/BMI	INSTR BG 1:11
STRANGE VISITORS	ALEXIS K. DE AZEVEDO	AZEVEDO MUSIC/BMI	INSTR BG 1:17
STRANGE VISITORS	ALEXIS K. DE AZEVEDO	AZEVEDO MUSIC/BMI	INSTR BG :27
THE CHASE	ALEXIS K. DE AZEVEDO	AZEVEDO MUSIC/BMI	INSTR BG 2:02
REMORSE	ALEXIS K. DE AZEVEDO	AZEVEDO MUSIC/BMI	INSTR BG :57
LOST HEADBAND	ALEXIS K. DE AZEVEDO	AZEVEDO MUSIC/BMI	INSTR BG :40
SAM'S THEME	ALEXIS K. DE AZEVEDO	AZEVEDO MUSIC/BMI	INSTR BG 2:47
AIN'T GIVING UP	ALEXIS K. DE AZEVEDO	AZEVEDO MUSIC/BMI	INSTR BG 1:10
AGAINST A CROOKED SKY	ALEXIS K. DE AZEVEDO/ BMI MACK DAVID/ ASCAP	AZEVEDO MUSIC/BMI & GNOLAUM MUSIC/ ASCAP	VOC BG :3
(CONTINUED - PAGE 2)			

PUBLISHER OR RIGHTS SECURED FROM
Composer Publisher

USAGE

TITLE

AGAINST A CROOKED
SKY

ALEXIS K.
DE AZEVEDO/
BMI
MACK DAVID/
ASCAP

AZEVEDO MUSIC/BMI
& GNOLAUM MUSIC/
ASCAP

INSTR BG :28

GOT TO KNOW FOR
SURE

ALEXIS K.
DE AZEVEDO

AZEVEDO MUSIC/BMI

INSTR BG :43

RUSSIAN'S THEME

ALEXIS K.
DE AZEVEDO

AZEVEDO MUSIC/BMI

INSTR BG 1:57

CUT TONGUES STORY

ALEXIS K.
DE AZEVEDO

AZEVEDO MUSIC/BMI

INSTR BG 1:59

LISTENING TO A
BRAT

ALEXIS K.
DE AZEVEDO

AZEVEDO MUSIC/BMI

INSTR BG :12

APACHE COUNTRY

ALEXIS K.
DE AZEVEDO

AZEVEDO MUSIC/BMI

INSTR BG :51

AMBUSH

ALEXIS K.
DE AZEVEDO

AZEVEDO MUSIC/BMI

INSTR BG 2:12

END OF THE WORLD

ALEXIS K.
DE AZEVEDO

AZEVEDO MUSIC/BMI

INSTR BG :18

HOLE IN THE ROCK

ALEXIS K.
DE AZEVEDO

AZEVEDO MUSIC/BMI

INSTR BG :07

SAM'S THEME

ALEXIS K.
DE AZEVEDO

AZEVEDO MUSIC/BMI

INSTR BG :44

LOST HEADBAND

ALEXIS K.
DE AZEVEDO

AZEVEDO MUSIC/BMI

INSTR BG :15

DEFEAT

ALEXIS K.
DE AZEVEDO

AZEVEDO MUSIC/BMI

INSTR BG :32

HOLE IN THE ROCK

ALEXIS K.
DE AZEVEDO

AZEVEDO MUSIC/BMI

PARTIAL
INSTR BG :48

HOLE IN THE ROCK

ALEXIS K.
DE AZEVEDO

AZEVEDO MUSIC/BMI

INSTR BG :53

A STRANGE PLACE

ALEXIS K.
DE AZEVEDO

AZEVEDO MUSIC/BMI

INSTR BG 2:12

THE TRUTH OF THE
MATTER

ALEXIS K.
DE AZEVEDO

AZEVEDO MUSIC/BMI

INSTR BG :48

(CONTINUED - PAGE 3)

TITLE

PUBLISHER OR RIGHTS SECURED FROM
Composer Publisher

USAGE

THE FINISHING TOUCH	ALEXIS K. DE AZEVEDO	AZEVEDO MUSIC/BMI	INSTR BG :34
THE FUNERAL	ALEXIS K. DE AZEVEDO	AZEVEDO MUSIC/BMI	VISUAL INSTR 1:02
SAM'S DECISION	ALEXIS K. DE AZEVEDO	AZEVEDO MUSIC/BMI	INSTR BG 3:21
SAM'S DECISION	ALEXIS K. DE AZEVEDO	AZEVEDO MUSIC/BMI	PARTIAL INSTR BG :37
RACE AGAINST THE ARROW	ALEXIS K. DE AZEVEDO	AZEVEDO MUSIC/BMI	INSTR BG 5:18
WELCOME HOME	ALEXIS K. DE AZEVEDO	AZEVEDO MUSIC/BMI	INSTR BG :23
TIME LAPSE	ALEXIS K. DE AZEVEDO	AZEVEDO MUSIC/BMI	INSTR BG :32
REMORSE	ALEXIS K. DE AZEVEDO	AZEVEDO MUSIC/BMI	INSTR BG :44
LOST HEADBAND	ALEXIS K. DE AZEVEDO	AZEVEDO MUSIC/BMI	INSTR BG :16
THE CHASE	ALEXIS K. DE AZEVEDO	AZEVEDO MUSIC/BMI	INSTR BG 1:03
CHARLOTTE'S RETURN	ALEXIS K. DE AZEVEDO	AZEVEDO MUSIC/BMI	INSTR BG 3:03
AGAINST A CROOKED SKY	ALEXIS K. 46 DE AZEVEDO/ BMI 46 MACK DAVID/ ASCAP	AZEVEDO MUSIC/BMI & GNOLAUM MUSIC/ ASCAP	VOC BG 1:32

MT Main titles

ET End titles

BG Background

VIS Visual

BAFFLED!

Music Cue Sheet
(Second Version)T.V. Cinema
Showing

JIM

Footage	Composer	Description	Publisher	Time
165-6				
169-6	Richard Hill	BG	ATV Music Corp.	2. 2/3sec
193-1				
197-11	"	BG	"	3sec
211-1				
213-14	"	BG	"	1. 1/3sec
464-13				
484-13	"	BG	"	13. 1/3sec
581-9				
765-13	"	BG/MT	"	2min 2. 2/3sec
<u>Reel 2</u>				
233-11				
266-2	"	BG	"	21. 2/3sec
364-12				
415-4	"	BG	"	33. 1/3sec
490-8				
542-5	"	BG	"	34. 1/3sec
615-15				
776-12	"	BG	"	1min 47. 1/3sec
<u>Reel 3</u>				
202-1				
236-6	"	BG	"	22. 2/3sec
507-5				
529-14	"	BG	"	15. 1/3sec
602-5				
724-13	"	BG	"	1min 22sec
727-13				
767-10	"	BG	"	26. 2/3sec
<u>Reel 4</u>				
91-7				
169-0	"	BG	"	52sec
301-12				
347-2	"	BG	"	30sec
386-2				
450-11	"	BG	"	42. 2/3sec
455-2				
484-8	"	VIS	"	19. 1/3sec
508-11				
516-4	"	BG	"	4. 2/3sec
538-9				
626-8	"	BG	"	25. 1/3sec

BAF FLED! Music Cue Sheet (Second Version) Page 2.

Footage	Composer	Description	Publisher	Time
<u>Reel 4 cont.</u>				
627-4				
631-9	Richard Hill	BG	ATV Music Corp.	2. 2/3sec
674-13				
701-1	"	BG	"	17. 1/3sec
<u>Reel 5</u>				
67-8				1min
212-0	"	BG	"	36. 2/3sec
344-9				
380-14	"	BG	"	24sec
492-2				1min
595-8	"	BG	"	8. 2/3sec
<u>Reel 6</u>				
0				
68-0	"	BG	"	45. 1/3sec
185-13				1min
302-0	"	BG	"	30. 2/3sec
310-0				
322-12	"	BG	"	8. 2/3sec
471-0				
507-0	"	BG	"	24sec
731-2				
753-0	"	BG	"	14. 2/3sec
<u>Reel 7</u>				
92-9				
179-10	"	BG	"	58sec
281-11				1min
439-1	"	BG	"	44. 2/3sec
566-8				
584-2	"	BG	"	12sec
622-6				
645-3	"	BG	"	15. 1/3sec
726-0				
759-14	"	BG	"	22. 2/3sec
<u>Reel 8</u>				
22-10				
49-8	"	BG	"	18sec
79-5				
87-11	"	VIS	"	5. 1/3sec
120-10				
199-8	"	BG	"	55. 2/3sec
550-4				
556-4	"	BG	"	4sec
619-9				
624-15	"	BG	"	2. 2/3sec

BAFFLED! Music Cue Sheet (Second Version) Page 3.

Footage	Composer	Description	Publisher	Time
<u>Reel 9</u>				
50-15 205-6	Richard Hill	BG	ATV- MUSIC CORP.	1min 43. 1/3sec
225-9 283-11	"	BG	"	38. 2/3sec
398-5 513-6	"	BG	"	1min 16. 2/3sec
<u>Reel 10</u>				
23-1 154-11	"	BG	"	21. 1/3sec
160-10 381-6	"	BG	"	2min 27. 1/3sec
516-6 560-8	"	BG	"	29. 1/3sec
566-12 571-13	"	BG	"	3. 1/3sec
572-14 591-14	"	BG	"	12. 2/3sec
619-2 716-2	"	BG/ET	"	1min 4. 2/3sec

CUE SHEET FOR WORLD OUTSIDE
OF THE UNITED STATES
See Cue # 11 for revision.

REVISED: Sept. 7, 1973
Date June 14, 1972

Prod. No. #132087 (#8991)

COLUMBIA PICTURES CORPORATION

711 Fifth Avenue
New York, New York

R E V I S E D

Musical Compositions Recorded in

A PRODUCTION ENTITLED: BUTTERFLIES ARE FREE (Feature)
(XXXXXX)

PRODUCED BY: FRANKOVICH PRODUCTIONS, INC.

Recorded by Columbia Pictures Corporation at 1438 No. Gower Street, Hollywood, California.

Columbia Pictures Corporation

By JONIE TAPS
Music ~~XXXXXXXX~~ Executive

REEL <u>1</u>	1. Title of Composition <u>MAIN TITLE "CARRY ME"</u>	TIME <u>1:33</u>
	COMPOSER <u>BOB ALCTVAR, BMI; RANDY McNEILL, ASCAP</u>	PUBLISHER <u>SCREEN GEMS-COLUMBIA MUSIC, INC. / COLGEMS MUSIC CORP.</u>
	VOCAL OR INSTRUMENTAL <u>V</u>	BACKGROUND OR VISUAL <u>B</u>
	PARTIAL OR ENTIRE <u>E</u>	LICENSE SECURED <u>COLUMBIA SYNC RIGHTS</u>
	2. Title of Composition <u>"BUTTERFLIES ARE FREE"</u>	TIME <u>1:22</u>
	COMPOSER <u>WORDS & MUSIC: STEVE SCHWARTZ</u>	PUBLISHER <u>SUNBURY MUSIC, INC.</u>
	VOCAL OR INSTRUMENTAL <u>V</u>	BACKGROUND OR VISUAL <u>B</u>
	PARTIAL OR ENTIRE <u>P</u>	LICENSE SECURED <u>ONE PICTURE RIGHTS</u>
	3. Title of Composition <u>AD LIB GUITAR CHORDS</u>	TIME <u>:25</u>
	COMPOSER <u>--</u>	PUBLISHER <u>--</u>
	VOCAL OR INSTRUMENTAL <u>I</u>	BACKGROUND OR VISUAL <u>V</u>
	PARTIAL OR ENTIRE <u>--</u>	LICENSE SECURED <u>COLUMBIA SYNC RIGHTS</u>
	4. Title of Composition <u>JILL'S RADIO</u>	TIME <u>:13</u>
	COMPOSER <u>BOB ALCTVAR, BMI</u>	PUBLISHER <u>SCREEN GEMS-COLUMBIA MUSIC, INC.</u>
	VOCAL OR INSTRUMENTAL <u>I</u>	BACKGROUND OR VISUAL <u>V</u>
	PARTIAL OR ENTIRE <u>E</u>	LICENSE SECURED <u>COLUMBIA SYNC RIGHTS</u>
REEL <u>3</u>	5. Title of Composition <u>AD LIB GUITAR CHORDS</u>	TIME <u>:23</u>
	COMPOSER <u>--</u>	PUBLISHER <u>--</u>
	VOCAL OR INSTRUMENTAL <u>I</u>	BACKGROUND OR VISUAL <u>V</u>
	PARTIAL OR ENTIRE <u>--</u>	LICENSE SECURED <u>COLUMBIA SYNC RIGHTS</u>
	6. Title of Composition <u>AD LIB GUITAR CHORDS</u>	TIME <u>:10</u>
	COMPOSER <u>--</u>	PUBLISHER <u>--</u>
	VOCAL OR INSTRUMENTAL <u>I</u>	BACKGROUND OR VISUAL <u>V</u>
	PARTIAL OR ENTIRE <u>--</u>	LICENSE SECURED <u>COLUMBIA SYNC RIGHTS</u>
	7. Title of Composition <u>AD LIB GUITAR CHORDS</u>	TIME <u>:17</u>
	COMPOSER <u>--</u>	PUBLISHER <u>--</u>
	VOCAL OR INSTRUMENTAL <u>I</u>	BACKGROUND OR VISUAL <u>V</u>
	PARTIAL OR ENTIRE <u>--</u>	LICENSE SECURED <u>COLUMBIA SYNC RIGHTS</u>

- 8 - Title of Composition AD LIB GUITAR CHORDS TIME :03
 COMPOSER --- PUBLISHER ---
 VOCAL OR INSTRUMENTAL I BACKGROUND OR VISUAL V
 PARTIAL OR ENTIRE --- LICENSE SECURED COLUMBIA SYNC RIGHTS
- 9 - Title of Composition "BUTTERFLIES ARE FREE" TIME 1:07
 COMPOSER WORDS & MUSIC: STEVE SCHWARTZ PUBLISHER SUNBURY MUSIC, INC.
 VOCAL OR INSTRUMENTAL V BACKGROUND OR VISUAL V
 PARTIAL OR ENTIRE P LICENSE SECURED ONE PICTURE RIGHTS
- REEL 4
 10 - Title of Composition "BRANDENBURG CONCERTO NO. 2" TIME 3:47
 COMPOSER PUBLIC DOMAIN - J.S. BACH PUBLISHER SCREEN GEMS-COLUMBIA MUSIC, INC.
 ADAPTED: BOB ALCIVAR, BMI BACKGROUND OR VISUAL V
 VOCAL OR INSTRUMENTAL I LICENSE SECURED COLUMBIA SYNC RIGHTS
 PARTIAL OR ENTIRE E
- 11 - Title of Composition "BILLBOARD MARCH" (AD LIB HUMMING) TIME :09
 COMPOSER John N. Klor PUBLISHER The John Church Co.
 VOCAL OR INSTRUMENTAL V BACKGROUND OR VISUAL V
 PARTIAL OR ENTIRE P LICENSE SECURED One Picture Rights
- REEL 5
 12 - Title of Composition PICNIC AT THE BEACH TIME 1:20
 COMPOSER BOB ALCIVAR, BMI PUBLISHER SCREEN GEMS-COLUMBIA MUSIC, INC.
 VOCAL OR INSTRUMENTAL I BACKGROUND OR VISUAL B
 PARTIAL OR ENTIRE E LICENSE SECURED COLUMBIA SYNC RIGHTS
- 13 - Title of Composition "BUTTERFLIES ARE FREE" TIME :26
 COMPOSER WORDS & MUSIC: STEVE SCHWARTZ PUBLISHER SUNBURY MUSIC, INC.
 VOCAL OR INSTRUMENTAL V BACKGROUND OR VISUAL V
 PARTIAL OR ENTIRE P LICENSE SECURED ONE PICTURE RIGHTS
- REEL 6
 14 - Title of Composition "TAKE ME HOME, COUNTRY ROADS" TIME :34
 COMPOSER WORDS & MUSIC: BILL DANOFF; TAFFY NORT; JOHN DENVER PUBLISHER CHERRY LANE MUSIC CO.
 VOCAL OR INSTRUMENTAL V BACKGROUND OR VISUAL V
 PARTIAL OR ENTIRE P LICENSE SECURED ONE PICTURE RIGHTS
- 15 - Title of Composition COUNTRY-HAIR COMB TIME 1:33
 COMPOSER BOB ALCIVAR, BMI PUBLISHER SCREEN GEMS-COLUMBIA MUSIC, INC.
 VOCAL OR INSTRUMENTAL I BACKGROUND OR VISUAL B
 PARTIAL OR ENTIRE E LICENSE SECURED COLUMBIA SYNC RIGHTS
- REEL 8
 16 - Title of Composition BOSSA LASAGNE TIME 2:13
 COMPOSER BOB ALCIVAR, BMI PUBLISHER SCREEN GEMS-COLUMBIA MUSIC, INC.
 VOCAL OR INSTRUMENTAL I & V Effects BACKGROUND OR VISUAL B
 PARTIAL OR ENTIRE E LICENSE SECURED COLUMBIA SYNC RIGHTS
- REEL 9
 17 - Title of Composition HORNS TIME :11
 COMPOSER BOB ALCIVAR, BMI PUBLISHER SCREEN GEMS-COLUMBIA MUSIC, INC.
 VOCAL OR INSTRUMENTAL I BACKGROUND OR VISUAL B
 PARTIAL OR ENTIRE E LICENSE SECURED COLUMBIA SYNC RIGHTS

18 - Title of Composition "BUTTERFLIES ARE FREE" TIME :37
COMPOSER WORDS & MUSIC: STEVE SCHWARTZ
PUBLISHER SUNBURY MUSIC, INC.
VOCAL OR INSTRUMENTAL V BACKGROUND OR VISUAL V
PARTIAL OR ENTIRE P LICENSE SECURED ONE PICTURE RIGHTS

REEL 12

19 - Title of Composition "BUTTERFLIES ARE FREE" TIME :49
COMPOSER WORDS & MUSIC: STEVE SCHWARTZ
PUBLISHER SUNBURY MUSIC, INC.
VOCAL OR INSTRUMENTAL V BACKGROUND OR VISUAL V
PARTIAL OR ENTIRE P LICENSE SECURED ONE PICTURE RIGHTS

20 - Title of Composition END TITLE "BUTTERFLIES ARE FREE" TIME :38
COMPOSER WORDS & MUSIC: STEVE SCHWARTZ
PUBLISHER SUNBURY MUSIC, INC.
VOCAL OR INSTRUMENTAL I BACKGROUND OR VISUAL B
PARTIAL OR ENTIRE P LICENSE SECURED ONE PICTURE RIGHTS

- Title of Composition _____ TIME _____
COMPOSER _____
PUBLISHER _____
VOCAL OR INSTRUMENTAL _____ BACKGROUND OR VISUAL _____
PARTIAL OR ENTIRE _____ LICENSE SECURED _____

- Title of Composition _____ TIME _____
COMPOSER _____
PUBLISHER _____
VOCAL OR INSTRUMENTAL _____ BACKGROUND OR VISUAL _____
PARTIAL OR ENTIRE _____ LICENSE SECURED _____

- Title of Composition _____ TIME _____
COMPOSER _____
PUBLISHER _____
VOCAL OR INSTRUMENTAL _____ BACKGROUND OR VISUAL _____
PARTIAL OR ENTIRE _____ LICENSE SECURED _____

- Title of Composition _____ TIME _____
COMPOSER _____
PUBLISHER _____
VOCAL OR INSTRUMENTAL _____ BACKGROUND OR VISUAL _____
PARTIAL OR ENTIRE _____ LICENSE SECURED _____

- Title of Composition _____ TIME _____
COMPOSER _____
PUBLISHER _____
VOCAL OR INSTRUMENTAL _____ BACKGROUND OR VISUAL _____
PARTIAL OR ENTIRE _____ LICENSE SECURED _____

- Title of Composition _____ TIME _____
COMPOSER _____
PUBLISHER _____
VOCAL OR INSTRUMENTAL _____ BACKGROUND OR VISUAL _____
PARTIAL OR ENTIRE _____ LICENSE SECURED _____

- Title of Composition _____ TIME _____
COMPOSER _____
PUBLISHER _____
VOCAL OR INSTRUMENTAL _____ BACKGROUND OR VISUAL _____
PARTIAL OR ENTIRE _____ LICENSE SECURED _____

English Title: "GOLIATH AGAINST THE GIANTS"

F000846

Regia: Guido MALATESTA

Produzione: CINEPRODUZIONI ASSOCIATE, Roma
Distributore: PROCUSA FILM, Madrid

Origine: ital.-spagnolo

Lunghezza: 2656 metri

Durata musicale: 3799"

Nº 34760

Date: 12/5/61

Anno di produzione: 1961

Interpreti principali: Brad Harris, Gloria Miland,, Fernando Rey

[illegible]

Foo 1902

Date March 26, 1969

Prod. No. 8901

COLUMBIA PICTURES CORPORATION

711 Fifth Avenue
New York, New York

Musical Compositions Recorded in (REVISED)

A PRODUCTION ENTITLED: HOOK, LINE & SINKER (Feature)
(Teaser)

PRODUCED BY: JERRY LEWIS FILMS, INC.

Recorded by Columbia Pictures Corporation at 1438 No. Gower Street, Hollywood, California.

Columbia Pictures Corporation

By JONIE TAPS, MUSIC EXEC
Music Department

REEL 1

1. Title of Composition MAIN TITLE TIME :18
COMPOSER DICK STABILE, BMI
PUBLISHER SCREEN GEMS-COLUMBIA MUSIC, INC.
VOCAL OR INSTRUMENTAL I BACKGROUND OR VISUAL B
PARTIAL OR ENTIRE E LICENSE SECURED COLUMBIA SYNC RIGHTS
2. Title of Composition HAIL THE BOAT TIME :50
COMPOSER DICK STABILE, BMI
PUBLISHER SCREEN GEMS-COLUMBIA MUSIC, INC.
VOCAL OR INSTRUMENTAL I BACKGROUND OR VISUAL B
PARTIAL OR ENTIRE E LICENSE SECURED COLUMBIA SYNC RIGHTS
3. Title of Composition GRANT TIME 1:39
COMPOSER DICK STABILE, BMI
PUBLISHER SCREEN GEMS-COLUMBIA MUSIC, INC.
VOCAL OR INSTRUMENTAL I BACKGROUND OR VISUAL B
PARTIAL OR ENTIRE E LICENSE SECURED COLUMBIA SYNC RIGHTS

REEL 2

4. Title of Composition T.V. SOURCE TIME :01 1/2
COMPOSER DICK STABILE, BMI
PUBLISHER SCREEN GEMS-COLUMBIA MUSIC, INC.
VOCAL OR INSTRUMENTAL I BACKGROUND OR VISUAL V
PARTIAL OR ENTIRE E LICENSE SECURED COLUMBIA SYNC RIGHTS
5. Title of Composition NANCY LOV'S ROMANCE TIME :45
COMPOSER DICK STABILE, BMI
PUBLISHER SCREEN GEMS-COLUMBIA MUSIC, INC.
VOCAL OR INSTRUMENTAL V BACKGROUND OR VISUAL V
PARTIAL OR ENTIRE P LICENSE SECURED COLUMBIA SYNC RIGHTS
6. Title of Composition "WILLIAM TELL" OVERTURE TIME 1:11 1/2
COMPOSER PUBLIC DOMAIN
PUBLISHER -
VOCAL OR INSTRUMENTAL I BACKGROUND OR VISUAL B
PARTIAL OR ENTIRE E LICENSE SECURED -

REEL 3

7. Title of Composition "ROCK OF AGES" TIME :38
COMPOSER PUBLIC DOMAIN
PUBLISHER -
VOCAL OR INSTRUMENTAL I BACKGROUND OR VISUAL V
PARTIAL OR ENTIRE P LICENSE SECURED -

- 8 Title of Composition NANCY LOVES ROMANCE TIME 2:14
COMPOSER DICK STABILE, BMI
PUBLISHER SCREEN GEMS-COLUMBIA MUSIC, INC.
VOCAL OR INSTRUMENTAL V BACKGROUND OR VISUAL V
PARTIAL OR ENTIRE E LICENSE SECURED COLUMBIA SYNC RIGHTS
- 9 Title of Composition PIANO NOODLING TIME :04
COMPOSER AD LTB
PUBLISHER -
VOCAL OR INSTRUMENTAL I BACKGROUND OR VISUAL V
PARTIAL OR ENTIRE - LICENSE SECURED -
- 10 Title of Composition PIANO SCALES TIME :05½
COMPOSER AD LTB
PUBLISHER -
VOCAL OR INSTRUMENTAL I BACKGROUND OR VISUAL V
PARTIAL OR ENTIRE - LICENSE SECURED -
- 11 Title of Composition CARDIOGRAM MUSIC TIME :30
COMPOSER DICK STABILE, BMI
PUBLISHER SCREEN GEMS-COLUMBIA MUSIC, INC.
VOCAL OR INSTRUMENTAL I BACKGROUND OR VISUAL B
PARTIAL OR ENTIRE E LICENSE SECURED COLUMBIA SYNC RIGHTS
- REEL 4
12 Title of Composition SAD NEWS TIME 2:24
COMPOSER DICK STABILE, BMI
PUBLISHER SCREEN GEMS-COLUMBIA MUSIC, INC.
VOCAL OR INSTRUMENTAL I BACKGROUND OR VISUAL B
PARTIAL OR ENTIRE E LICENSE SECURED COLUMBIA SYNC RIGHTS
- 13 Title of Composition NEWSPAPER PT. 1 TIME :39½
COMPOSER DICK STABILE, BMI
PUBLISHER SCREEN GEMS-COLUMBIA MUSIC, INC.
VOCAL OR INSTRUMENTAL I BACKGROUND OR VISUAL B
PARTIAL OR ENTIRE E LICENSE SECURED COLUMBIA SYNC RIGHTS
- 14 Title of Composition NEWSPAPER AD - PT 2 TIME :31½
COMPOSER DICK STABILE, BMI
PUBLISHER SCREEN GEMS-COLUMBIA MUSIC, INC.
VOCAL OR INSTRUMENTAL I BACKGROUND OR VISUAL B
PARTIAL OR ENTIRE E LICENSE SECURED COLUMBIA SYNC RIGHTS
- 15 Title of Composition NEWSPAPER AD PT 3 TIME :31½
COMPOSER DICK STABILE, BMI
PUBLISHER SCREEN GEMS-COLUMBIA MUSIC, INC.
VOCAL OR INSTRUMENTAL I BACKGROUND OR VISUAL B
PARTIAL OR ENTIRE E LICENSE SECURED COLUMBIA SYNC RIGHTS
- REEL 5
16 Title of Composition POLLY'S POLLY TIME :38½
COMPOSER DICK STABILE, BMI
PUBLISHER SCREEN GEMS-COLUMBIA MUSIC, INC.
VOCAL OR INSTRUMENTAL I BACKGROUND OR VISUAL B
PARTIAL OR ENTIRE E LICENSE SECURED COLUMBIA SYNC RIGHTS
- 17 Title of Composition DANCING LESSON NO. 1 TIME :33
COMPOSER DICK STABILE, BMI
PUBLISHER SCREEN GEMS-COLUMBIA MUSIC, INC.
VOCAL OR INSTRUMENTAL I BACKGROUND OR VISUAL B
PARTIAL OR ENTIRE E LICENSE SECURED COLUMBIA SYNC RIGHTS

- 18 Title of Composition SAMBALOO TIME :13
COMPOSER DICK STABILE, BMI
PUBLISHER SCREEN GEMS-COLUMBIA MUSIC, INC.
VOCAL OR INSTRUMENTAL I BACKGROUND OR VISUAL B
PARTIAL OR ENTIRE E LICENSE SECURED COLUMBIA SYNC RIGHTS
- 19 Title of Composition TUXEDO ROCK TIME :18½
COMPOSER DICK STABILE, BMI
PUBLISHER SCREEN GEMS-COLUMBIA MUSIC, INC.
VOCAL OR INSTRUMENTAL I BACKGROUND OR VISUAL V
PARTIAL OR ENTIRE E LICENSE SECURED COLUMBIA SYNC RIGHTS
- 20 Title of Composition FISH TUGGING TIME :36
COMPOSER DICK STABILE, BMI
PUBLISHER SCREEN GEMS-COLUMBIA MUSIC, INC.
VOCAL OR INSTRUMENTAL I BACKGROUND OR VISUAL B
PARTIAL OR ENTIRE E LICENSE SECURED COLUMBIA SYNC RIGHTS
- 21 Title of Composition THE LIMBO (Original Caribbean Drum Music) TIME 3:07½
COMPOSER Eustace Thomas, Mario James, Lawrence Phillipus, Raphael Hall (Steel Drum Band)
PUBLISHER SCREEN GEMS-COLUMBIA MUSIC, INC.
VOCAL OR INSTRUMENTAL I BACKGROUND OR VISUAL V
PARTIAL OR ENTIRE E LICENSE SECURED COLUMBIA SYNC RIGHTS
- REEL 6
22 Title of Composition PATTI'S BOSSA NOVA TIME :42½
COMPOSER DICK STABILE, BMI
PUBLISHER SCREEN GEMS-COLUMBIA MUSIC, INC.
VOCAL OR INSTRUMENTAL I BACKGROUND OR VISUAL V
PARTIAL OR ENTIRE E LICENSE SECURED COLUMBIA SYNC RIGHTS
- 23 Title of Composition T.V. SOURCE TIME 1:11
COMPOSER DICK STABILE
PUBLISHER SCREEN GEMS-COLUMBIA MUSIC, INC.
VOCAL OR INSTRUMENTAL I BACKGROUND OR VISUAL B
PARTIAL OR ENTIRE E LICENSE SECURED COLUMBIA SYNC RIGHTS
- 24 Title of Composition CIGARET BOSSA TIME 3:20
COMPOSER DICK STABILE, BMI
PUBLISHER SCREEN GEMS-COLUMBIA MUSIC, INC.
VOCAL OR INSTRUMENTAL I BACKGROUND OR VISUAL B
PARTIAL OR ENTIRE E LICENSE SECURED COLUMBIA SYNC RIGHTS
- 25 Title of Composition FRESH AIR TIME :42½
COMPOSER DICK STABILE, BMI
PUBLISHER SCREEN GEMS-COLUMBIA MUSIC, INC.
VOCAL OR INSTRUMENTAL I BACKGROUND OR VISUAL B
PARTIAL OR ENTIRE E LICENSE SECURED COLUMBIA SYNC RIGHTS
- REEL 7
26 Title of Composition PORTUGAL STREET MUSIC TIME :31½
COMPOSER DICK STABILE, BMI
PUBLISHER SCREEN GEMS-COLUMBIA MUSIC, INC.
VOCAL OR INSTRUMENTAL I BACKGROUND OR VISUAL B
PARTIAL OR ENTIRE E LICENSE SECURED COLUMBIA SYNC RIGHTS
- 27 Title of Composition FIRST MORGUE TIME :37
COMPOSER DICK STABILE, BMI
PUBLISHER SCREEN GEMS-COLUMBIA MUSIC, INC.
VOCAL OR INSTRUMENTAL I BACKGROUND OR VISUAL B
PARTIAL OR ENTIRE E LICENSE SECURED COLUMBIA SYNC RIGHTS

28 Title of Composition STREETS OF PORTUGAL TIME :21½
 COMPOSER DICK STABILE, BMI
 PUBLISHER SCREEN GEMS-COLUMBIA MUSIC,
 VOCAL OR INSTRUMENTAL I BACKGROUND OR VISUAL B INC.
 PARTIAL OR ENTIRE E LICENSE SECURED COLUMBIA SYNC RIGHTS

29 Title of Composition SECOND MORGUE TIME :54½
 COMPOSER DICK STABILE, BMI
 PUBLISHER SCREEN GEMS-COLUMBIA MUSIC,
 VOCAL OR INSTRUMENTAL I BACKGROUND OR VISUAL B INC.
 PARTIAL OR ENTIRE E LICENSE SECURED COLUMBIA SYNC RIGHTS

REEL 8
 30 Title of Composition NANCY IN LOBBY TIME :43
 COMPOSER DICK STABILE, BMI
 PUBLISHER SCREEN GEMS-COLUMBIA MUSIC,
 VOCAL OR INSTRUMENTAL I BACKGROUND OR VISUAL B INC.
 PARTIAL OR ENTIRE E LICENSE SECURED COLUMBIA SYNC RIGHTS

31 Title of Composition AUSTRALIAN MARCH TIME :55
 COMPOSER DICK STABILE, BMI
 PUBLISHER SCREEN GEMS-COLUMBIA MUSIC,
 VOCAL OR INSTRUMENTAL I BACKGROUND OR VISUAL B INC.
 PARTIAL OR ENTIRE E LICENSE SECURED COLUMBIA SYNC RIGHTS

32 Title of Composition AUSTRALIAN MARCH TIME :12½
 COMPOSER DICK STABILE, BMI
 PUBLISHER SCREEN GEMS-COLUMBIA MUSIC,
 VOCAL OR INSTRUMENTAL I BACKGROUND OR VISUAL B INC.
 PARTIAL OR ENTIRE P LICENSE SECURED COLUMBIA SYNC RIGHTS

33 Title of Composition "BLESSED ASSURANCE" TIME :50
 COMPOSER PUBLIC DOMAIN
 PUBLISHER -
 VOCAL OR INSTRUMENTAL I BACKGROUND OR VISUAL B
 PARTIAL OR ENTIRE E LICENSE SECURED -

REEL 9
 34 Title of Composition PHONE HANGUP TIME 2:23
 COMPOSER DICK STABILE, BMI
 PUBLISHER SCREEN GEMS-COLUMBIA MUSIC,
 VOCAL OR INSTRUMENTAL I BACKGROUND OR VISUAL B INC.
 PARTIAL OR ENTIRE E LICENSE SECURED COLUMBIA SYNC RIGHTS

35 Title of Composition EARTH PEOPLE TIME :40½
 COMPOSER DICK STABILE, BMI
 PUBLISHER SCREEN GEMS-COLUMBIA MUSIC
 VOCAL OR INSTRUMENTAL I BACKGROUND OR VISUAL B
 PARTIAL OR ENTIRE E LICENSE SECURED COLUMBIA SYNC RIGHTS

36 Title of Composition MORGUE FOLK - PT 1 TIME :45½
 COMPOSER DICK STABILE, BMI
 PUBLISHER SCREEN GEMS-COLUMBIA MUSIC,
 VOCAL OR INSTRUMENTAL I BACKGROUND OR VISUAL B INC.
 PARTIAL OR ENTIRE E LICENSE SECURED COLUMBIA SYNC RIGHTS

37 Title of Composition MORGUE FOLK - PT 2 TIME 1:28
 COMPOSER DICK STABILE, BMI
 PUBLISHER SCREEN GEMS-COLUMBIA MUSIC,
 VOCAL OR INSTRUMENTAL I BACKGROUND OR VISUAL B INC.
 PARTIAL OR ENTIRE E LICENSE SECURED COLUMBIA SYNC RIGHTS

- 38- Title of Composition MORGUE FOLK AND CASKETS TIME :11 1/2
 COMPOSER DICK STABILE, BMI PUBLISHER SCREEN GEMS-COLUMBIA MUSIC, INC.
 VOCAL OR INSTRUMENTAL I BACKGROUND OR VISUAL B
 PARTIAL OR ENTIRE E LICENSE SECURED COLUMBIA SYNC RIGHTS
- 39- Title of Composition VET DOCTOR AND CUSTOMS TIME :22
 COMPOSER DICK STABILE, BMI PUBLISHER SCREEN GEMS-COLUMBIA MUSIC, INC.
 VOCAL OR INSTRUMENTAL I BACKGROUND OR VISUAL B
 PARTIAL OR ENTIRE E LICENSE SECURED COLUMBIA SYNC RIGHTS
- 40- Title of Composition FISHING IN CHILE TIME :18
 COMPOSER DICK STABILE, BMI PUBLISHER SCREEN GEMS-COLUMBIA MUSIC, INC.
 VOCAL OR INSTRUMENTAL I BACKGROUND OR VISUAL B
 PARTIAL OR ENTIRE E LICENSE SECURED COLUMBIA SYNC RIGHTS
- REEL 12
 41- Title of Composition DRUMS (AD LIB) TIME :20
 COMPOSER DICK STABILE, BMI PUBLISHER -
 VOCAL OR INSTRUMENTAL I BACKGROUND OR VISUAL B
 PARTIAL OR ENTIRE - LICENSE SECURED -
- 42- Title of Composition "DIXIE" TIME :19
 COMPOSER PUBLIC DOMAIN PUBLISHER -
 VOCAL OR INSTRUMENTAL I BACKGROUND OR VISUAL V
 PARTIAL OR ENTIRE P LICENSE SECURED -
- 43- Title of Composition GEMETARY CHURCH TIME :22
 COMPOSER DICK STABILE, BMI PUBLISHER SCREEN GEMS-COLUMBIA MUSIC, INC.
 VOCAL OR INSTRUMENTAL I BACKGROUND OR VISUAL B
 PARTIAL OR ENTIRE E LICENSE SECURED COLUMBIA SYNC RIGHTS
- 44- Title of Composition FISHING BATTLE TIME :36
 COMPOSER DICK STABILE, BMI PUBLISHER SCREEN GEMS-COLUMBIA MUSIC, INC.
 VOCAL OR INSTRUMENTAL I BACKGROUND OR VISUAL B
 PARTIAL OR ENTIRE E LICENSE SECURED COLUMBIA SYNC RIGHTS
- 45- Title of Composition FISH IN MY HEART TIME :12
 COMPOSER DICK STABILE, BMI PUBLISHER SCREEN GEMS-COLUMBIA MUSIC, INC.
 VOCAL OR INSTRUMENTAL I BACKGROUND OR VISUAL B
 PARTIAL OR ENTIRE E LICENSE SECURED COLUMBIA SYNC RIGHTS
- 46- Title of Composition END TITLE TIME :26 1/2
 COMPOSER DICK STABILE, BMI PUBLISHER SCREEN GEMS-COLUMBIA MUSIC, INC.
 VOCAL OR INSTRUMENTAL I BACKGROUND OR VISUAL B
 PARTIAL OR ENTIRE E LICENSE SECURED COLUMBIA SYNC RIGHTS
- Title of Composition _____ TIME _____
 COMPOSER _____ PUBLISHER _____
 VOCAL OR INSTRUMENTAL _____ BACKGROUND OR VISUAL _____
 PARTIAL OR ENTIRE _____ LICENSE SECURED _____

UNLESS OTHERWISE NOTED All compositions in connection with this production are:

- 1) Composed by GIL MELLE - EMI
- 2) Published by SCREEN GEMS COLUMBIA MUSIC
- 3) Secured for License by: SCREEN GEMS SYNC. RTS.
- 4) All Instrumental, Background, and Entire.

SCREEN GEMS
711 Fifth Avenue
New York, New York

Musical Compositions Recorded in

F00 2457

PAGE 1

Date APRIL 30, 1974

Prod. No. 162064

RECEIVED

MAY 8 REC'D

Music Clearance Dept.

A PRODUCTION ENTITLED: "THE LAST ANGRY MAN"

TELEVISION PILOT

TELEVISION SERIES

PRODUCED BY: SCREEN GEMS, A DIVISION OF COLUMBIA PICTURES INDUSTRIES, INC.

Screen Gems, Inc.

By RICHARD BERRES

- | | | | | |
|-------------------------|---------------------------------------|--------|------|--------|
| 1. Title of Composition | THE LAST ANGRY MAN MAIN TITLE | TIME | 2:58 | 4/3/74 |
| COMPOSER | | | | |
| | PUBLISHER | | | |
| VOCAL OR INSTRUMENTAL | BACKGROUND OR VISUAL | | | |
| PARTIAL OR ENTIRE | LICENSE SECURED | | | |
| 2. Title of Composition | LAMPLIGHT | TIME | :47 | 4/3/74 |
| COMPOSER | | | | |
| | PUBLISHER | | | |
| VOCAL OR INSTRUMENTAL | BACKGROUND OR VISUAL | | | |
| PARTIAL OR ENTIRE | LICENSE SECURED | | | |
| 3. Title of Composition | "SUNNY SIDE OF THE STREET" | TIME | :52 | |
| COMPOSER | DOOTHY FIELDS - JIMMY MC HUGH - ASCAP | | | |
| | PUBLISHER COL GEMS MUSIC CORP. | | | |
| VOCAL OR INSTRUMENTAL | BACKGROUND OR VISUAL | | | |
| PARTIAL OR ENTIRE | LICENSE SECURED | 4/7/74 | | |
| 4. Title of Composition | POOL HALL | TIME | 1:21 | 4/3/74 |
| COMPOSER | | | | |
| | PUBLISHER | | | |
| VOCAL OR INSTRUMENTAL | BACKGROUND OR VISUAL | | | |
| PARTIAL OR ENTIRE | LICENSE SECURED | | | |
| 5. Title of Composition | HOUSE FULL OF LING | TIME | :25 | 4/3/74 |
| COMPOSER | | | | |
| | PUBLISHER | | | |
| VOCAL OR INSTRUMENTAL | BACKGROUND OR VISUAL | | | |
| PARTIAL OR ENTIRE | LICENSE SECURED | | | |
| 6. Title of Composition | HI MRS. GOLDBERG | TIME | :58 | 4/3/74 |
| COMPOSER | | | | |
| | PUBLISHER | | | |
| VOCAL OR INSTRUMENTAL | BACKGROUND OR VISUAL | | | |
| PARTIAL OR ENTIRE | LICENSE SECURED | | | |
| 7. Title of Composition | FRUIT OF THE LOOM | TIME | :09 | 4/3/74 |
| COMPOSER | | | | |
| | PUBLISHER | | | |
| VOCAL OR INSTRUMENTAL | BACKGROUND OR VISUAL | | | |
| PARTIAL OR ENTIRE | LICENSE SECURED | | | |

Form 1846

GBS TELEVISION NETWORK



Lu Da Productions Inc.

3518 Cahuenga West, Suite 305 • Hollywood, CA 90068
851-6676

MUSIC CUE SHEET FOR LICENSING

"LOVE AT FIRST BITE"

MARCH 5, 1979

<u>CUE</u>	<u>TITLE</u>	<u>USAGE</u>	<u>TIME</u>
<u>REEL 1</u>			
M11A	"MAIN TITLE PT I"	SCORE	:54
COMPOSER:	CHARLES BERNSTEIN (ASCAP)		
PUBLISHER:	MEL-BREN MUSIC, INC. (ASCAP)		
M11B	"MAIN TITLE PT II"	SCORE	:45
COMPOSER:	CHARLES BERNSTEIN (ASCAP)		
PUBLISHER:	MEL-BREN MUSIC, INC. (ASCAP)		
M11C	"MAIN TITLE PT III"	VIS. INSTR.	:44
COMPOSER:	CHARLES BERNSTEIN (ASCAP)	SOURCE	
PUBLISHER:	MEL-BREN MUSIC, INC. (ASCAP)	ASCAP	
M12	"MAGAZINE MOMENT"	SCORE	2:09
COMPOSER:	CHARLES BERNSTEIN (ASCAP)		
PUBLISHER:	MEL-BREN MUSIC, INC. (ASCAP)		
M12A	"ARISTOCRATIC SPLIT"	SCORE	:43
COMPOSER:	CHARLES BERNSTEIN (ASCAP)		
PUBLISHER:	MEL-BREN MUSIC, INC. (ASCAP)		
M14/20	"TROUBLE IN TRANSYLVANIA"	SCORE	1:05
COMPOSER:	CHARLES BERNSTEIN (ASCAP)		
PUBLISHER:	MEL-BREN MUSIC, INC. (ASCAP)		
<u>REEL 2</u>			
M21	"THE COUNT & GIRL"	SCORE	1:06
COMPOSER:	CHARLES BERNSTEIN (ASCAP)		
PUBLISHER:	MEL-BREN MUSIC, INC. (ASCAP)	ASCAP	

<u>CUE</u>	<u>TITLE</u>	<u>USAGE</u>	<u>TIME</u>
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REEL 2 (CONT'D)

M23	"NEW YORK ARRIVAL"	SCORE	:19
COMPOSER:	CHARLES BERNSTEIN (ASCAP)		
PUBLISHER:	MEL-BREN MUSIC, INC. (ASCAP)		
M24	"MAIN TITLE PT III"	NON-VISUAL ORGAN SOURCE	1:03
COMPOSER:	CHARLES BERNSTEIN (ASCAP)		
PUBLISHER:	MEL-BREN MUSIC, INC. (ASCAP)		
M25	"HARLEM STREET"	RADIO SOURCE	1:40
COMPOSER:	CHARLES BERNSTEIN (ASCAP)		
PUBLISHER:	MEL-BREN MUSIC, INC. (ASCAP)		

REEL 3

M31	"MANHATTAN STREET"	SCORE	:19
COMPOSER:	CHARLES BERNSTEIN (ASCAP)		
PUBLISHER:	MEL-BREN MUSIC, INC. (ASCAP)		
M32	"CINDY AT LAST"	SCORE	2:54
COMPOSER:	CHARLES BERNSTEIN (ASCAP)		
PUBLISHER:	MEL-BREN MUSIC, INC. (ASCAP)		
M33	"NIGHT FLIGHT"	SCORE	1:21
COMPOSER:	CHARLES BERNSTEIN (ASCAP)		
PUBLISHER:	MEL-BREN MUSIC, INC. (ASCAP)		
M34	"SALSA"	NON-VISUAL INSTR. SOURCE	:23
COMPOSER:	CHARLES BERNSTEIN (ASCAP)		
PUBLISHER:	MEL-BREN MUSIC, INC. (ASCAP)		
M35	"HOW 'BOUT YOU"	VISUAL VOCAL	:08
COMPOSER:	BURTON LANE, WORDS: RALPH FREED		
PUBLISHER:	LEO FEIST, INC.		
M35A	"HOW 'BOUT YOU"	NON-VISUAL VOCAL	:16
COMPOSER:	BURTON LANE, WORDS: RALPH FREED		
PUBLISHER:	LEO FEIST, INC.		
M36/40	"LAMENT"	SCORE	:58
COMPOSER:	CHARLES BERNSTEIN (ASCAP)		
PUBLISHER:	MEL-BREN MUSIC, INC. (ASCAP)		

<u>CUE</u>	<u>TITLE</u>	<u>USAGE</u>	<u>TIME</u>
<u>REEL 4</u>			
M41	"DANCIN' THRU THE NIGHT"	JUKE BOX	1:56
WORDS/MUSIC:	CHARLES BERNSTEIN, JOE LONG,	SOURCE	
	STEVE HINES		
PUBLISHER:	MEL-BREN MUSIC, INC. (ASCAP)	ASCAP	
M42	DISCO II - "LOVE THEME DISCO"	JUKE BOX	2:00
COMPOSER:	CHARLES BERNSTEIN (ASCAP)	SOURCE	
PUBLISHER:	MEL-BREN MUSIC, INC. (ASCAP)		
M43	"I LOVE THE NIGHTLIFE" -	JUKE BOX	1:50
	"DISCO ROUND"	SOURCE	
COMPOSER:	ALICIA BRIDGES & SUSAN HUTCHESON		
PUBLISHER:	LOWERY MUSIC CO., INC.		
M44/50	"ROMANIAN FOLK SONG"	PHONO	2:30
COMPOSER:		INSTR. &	
ARRANGER:	CHARLES BERNSTEIN (ASCAP) ASCAP	VOCAL	
PUBLISHER:		SOURCE	
<u>REEL 5</u>			
M51	"FIRST BITE"	SCORE	1:19
COMPOSER:	CHARLES BERNSTEIN (ASCAP)		
PUBLISHER:	MEL-BREN MUSIC, INC. (ASCAP)		
M52	"ROSENBERG'S OFFICE"	SCORE	1:44
COMPOSER:	CHARLES BERNSTEIN (ASCAP)	ASCAP	
PUBLISHER:	MEL-BREN MUSIC, INC. (ASCAP)		
M53	"COUNT IN CARRIAGE"	SCORE	:44
COMPOSER:	CHARLES BERNSTEIN (ASCAP)		
PUBLISHER:	MEL-BREN MUSIC, INC. (ASCAP)		
M54/60	"COCKTAIL SOURCE"	NON-VISUAL	3:20
COMPOSER:	CHARLES BERNSTEIN (ASCAP)	INSTR.	
PUBLISHER:	MEL-BREN MUSIC, INC. (ASCAP)	SOURCE	

MUSIC CUE SHEET FOR LICENSING - "LOVE AT FIRST BITE" - 3/5/79 PAGE F

CUE	TITLE	USAGE	TIME
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REEL 6

M61	"HYPNOSIS PSYCHOSIS"	SCORE	1:32
COMPOSER:	CHARLES BERNSTEIN (ASCAP)		
PUBLISHER:	MEL-BREN MUSIC, INC. (ASCAP)		

M61A	"FIRST BITE"	SCORE	:32
COMPOSER:	CHARLES BERNSTEIN (ASCAP)		
PUBLISHER:	MEL-BREN MUSIC, INC. (ASCAP)		

M62	"SUNRISE"	SCORE	:47
COMPOSER:	CHARLES BERNSTEIN (ASCAP)		
PUBLISHER:	MEL-BREN MUSIC, INC. (ASCAP)		

REEL 7

M71	"BURN BABY BURN"	SCORE	1:32
COMPOSER:	CHARLES BERNSTEIN (ASCAP)		
PUBLISHER:	MEL-BREN MUSIC, INC. (ASCAP)		

M71A	"LIFE IS JUST A BOWL OF CHERRIES"	NON-VIS. VOCAL	:30
COMPOSER:	LEW BROWN & RAY HENDERSON		
PUBLISHER:	DESYLVA, BROWN & HENDERSON		

M72	"DRACULA SUCKS"	SCORE	:22
COMPOSER:	CHARLES BERNSTEIN (ASCAP)		
PUBLISHER:	MEL-BREN MUSIC, INC. (ASCAP)		

M72A	"ANNIVERSARY SONG"	VOCAL SOURCE	:08
COMPOSER:	AL JOLSON & SOL CHAPLIN		
PUBLISHER:	MOOD MUSIC CO., INC.		

REEL 8

M81	"DINNER SOURCE"	NON-VISUAL INSTR. SOURCE	2:37
COMPOSER:	CHARLES BERNSTEIN (ASCAP)		
PUBLISHER:	MEL-BREN MUSIC, INC. (ASCAP)		

M82	"LOVE BITES BACK"	SCORE	1:54
COMPOSER:	CHARLES BERNSTEIN (ASCAP)		
PUBLISHER:	MEL-BREN MUSIC, INC. (ASCAP)		

F004285

SOCIETA' ITALIANA DEGLI AUTORI ED EDITORI (S.I.A.E.)

DIREZIONE GENERALE - SEZIONE MUSICA - ROMA
VIALE DELLA LETTERATURA (E.U.R.) - TELEGR. «AUTORI ROMA»

PROGRAMMA MUSICALE DI FILM SONORO

TITOLO { ITALIANO UN MINUTO PER PREPARARE UN Istante PER MORIRE (English Title "A Minute To Prepare To Die")
ORIGINALE _____

GENERE lungometraggio (per film di produzione straniera)
(lungometraggio-documentario-attualità-cartone animato) LUNGHEZZA 3.240 PASSO 35 mm. DURATA MUS. 2219
(in metri) (35 mm. - 16 mm. ecc.) (in minuti secondi)

NULLA-OSTA MINISTERIALE: N° 50379 DATA 5/12/67 ANNO DI PROD. 1967

PRODUTTORE Documento Film INDIRIZZO Via di Villa Patrizi, 7 - ROMA TEL. _____

CONCESSIONARIO _____ INDIRIZZO _____ TEL. _____
(per film di produzione straniera)

DISTRIBUTORE Columbia INDIRIZZO Via Varese, 16 - ROMA TEL. _____

PRIMA PROIEZ. IN ITALIA: DATA 8 febbraio 1968 LOCALE _____ LOCALITA' TORINO

AUTORI { DEL SOGG. Ugo Liberatore; DELLA SCENEGG. Ugo Liberatore
DELLA MUSICA CARLO RUSTICHELLI; DIRETT. ART. (Regista) Franco Giraldi

BREVI CENNI SUL SOGGETTO E INTERPRETI Alex Cord, Robert, Ryan, Arthur Kennedy,
Nicoletta Machiavelli

VI FU, SOSTITUZIONE, AGGIUNTA O SOPPRESSIONE DI MUSICA? _____ PER QUALE RAGIONE? _____

DOCUMENTAZIONE RELATIVA- _____

N° d'ordine delle scene	TITOLI DELLE COMPOSIZIONI MUSICALI DI COMMENTO AL FILM RIFERITI ALLE SINGOLE SCENE	COMPOSITORE (ed eventuale elaboratore per le sole composizioni di P.D.)	EDITORE	DURATA SECONDI	GENERE DI UTILIZZAZIONE DELLA MUSICA (di fondo, vocale, strumentale, visibile sulla schermo)
1	M 1	Carlo Rustichelli	RCA	126	strum
2	M 2	"	"	107	"
3	M 2	"	"	76	"
4	M 1	"	"	24	"
5	M 12	"	"	45	"
6	M 3	"	"	45	"
7	M 3	"	"	110	"
8	M 3	"	"	105	"
9	M 2	"	"	56	"
10	M 4	"	"	161	"
11	M 6	"	"	42	"
12	M 6	"	"	100	"

IL COMPOSITORE (O L'EDITORE) DELLA MUSICA, QUANTO AL DIRITTO ESCLUSIVO DI ESECUZIONE NELLA PROIEZIONE DEI FILM IN PAESI STRANIERI, FA ESPRESSO RIFERIMENTO AI RELATIVI BOLLETTINI DI DICHIARAZIONE.

DATA, _____

IL RESPONSABILE DELLA SINCRONIZZAZIONE

(firma leggibile)

Via di Villa Patrizi, 7

(indirizzo)

IL COMPOSITORE (o l'editore) DELLA MUSICA

(firma leggibile)

Via di Villa Patrizi, 7

(indirizzo)

IL PRODUTTORE

(o concessionario per i film stranieri)

S.r.l. DOCUMENTO FILM

(firma leggibile - indirizzo della ditta)

Via di Villa Patrizi, 7-3

(indirizzo)

QUE SHEET #20,272
NOVEMBER 18, 1960

(PRODUCER) TITANUS S.A.
RELEASED BY UNITED ARTISTS CORPORATION

"MONTE CARLO STORY" F000405

1	TITOLI	RENZO ROSSELLINI	TITANUS S A	INST	1:30
2	COSTA MONTECARLO	RENZO ROSSELLINI	TITANUS S A	INST	2:50
3	WIENER BLUTZ	J STRAUSS		INST	1:05
4	ESTERNO PIANA	CARLO SAVINA	TITANUS S A	INST	:25
	CASINO-SLOW #1				
5	INTERNO CASA HEMY	R RASCEL	KRAMER P. SCHAEFFERS	INST	1:48 ✓
	VOGLIAMOCI TANTO BENE				
6	INTERNO HALL HOTEL	RENZO ROSSELLINI	TITANUS S A	INST	:31
7	INTERNO HALL HOTEL	RENZO ROSSELLINI	TITANUS S A	INST	:30
8	INTERNO CAMERA HOTEL-	RENZO ROSSELLINI	TITANUS S A	INST	:30
	MARIA				
9	INTERNO HALL ALBERGO	RENZO ROSSELLINI	TITANUS S A	INST	:24
10	FASCINATION	MARCHETTI-LARICI	SOUTHERN MUSIC	VIS INST	:48
11	MINUETTO	LUIGI BOCCHERINI	PUBLIC DOMAIN	VIS INST	:34
12	SANTA LUCIA	IGNOTO	PUBLIC DOMAIN	VIS INST	:32
13	STORIELLE DEL BOSCO	J STRAUSS	PUBLIC DOMAIN	VIS INST	:3
14	LIEBERSTRAIM	F LISTZ	PUBLIC DOMAIN	VIS INST	:10
15	FASCINATION	MARCHETTI-LARICI	SOUTHERN MUSIC	VIS INST	:15
16	ESTERNO PIANA CASINO-	CARLO SAVINA	TITANUS S A	INST	:45
	SLOW #2				
17	VOGLIAMOCI TANTO BENE	RENATO RASCEL	KRAMER	INST	1:37 ✓
18	VOGLIAMOCI TANTO BENE	RENATO RASCEL	KRAMER	INST	:33 ✓
19	ESTERNO GIARDINO	RENZO ROSSELLINI	TITANUS S A	INST	:43
20	ESTERNO YACHT-CAINO	RENZO ROSSELLINI	TITANUS S A	INST	:16
	GIUGIA				
21	INTERNO HOTEL HALL	RENZO ROSSELLINI	TITANUS S A	INST	:55
22	RAGGIO VERDE	GIORGIO FAVOR	TITANUS S A	INST	1:01
23	VOGLIAMOCI TANTO BENE	RENATO RASCEL	KRAMER	INST	:38 ✓
	(A) TOUT WAS TRES	MISRAKI-BRACCHI	CURCI	VIS INST	:08
	BIEN MADAME				
	MARQUISE				
24	SERENATA	F SCHUBERT	PUBLIC DOMAIN	VIS INST	:53
25	SERENATA	F SCHUBERT	PUBLIC DOMAIN	VIS INST	:23
26	SCENA DEL BACIO	RENZO ROSSELLINI	TITANUS S A	INST	1:35
27	ESTERNO BALCONE	RENZO ROSSELLINI	TITANUS S A	INST	1:30
28	VOGLIAMOCI TANTO BENE	RENATO RASCEL	KRAMER P. SCHAEFFERS	INST	1:06 ✓
29	INTERNO CAMERA MARIA	RENZO ROSSELLINI	TITANUS S A	INST	2:45
30	HAPPY DAYS ARE HERE	MILTON AGER-JACK	YELLOW ROBBINS MUSIC CORP	VOC	:06
31	AGAIN				
31	ESTERNO STRADA IN	RENZO ROSSELLINI	TITANUS S A	INST	2:21
	COLLINA				
32	GABRIEL CORRE	RENZO ROSSELLINI	TITANUS S A	INST	:04
33	BERA SULLO YACHT	RENZO ROSSELLINI	TITANUS S A	INST	2:25
34	BARCAROLA	OFFENBACH	PUBLIC DOMAIN	VIS INST	:58

35	HAPPY DAYS ARE HERE AGAIN	MILTON AGER- JACK YELLEN	ROBBINS MUSIC CORP	VOC	:04
36	HAPPY DAYS ARE HERE AGAIN	MILTON AGER- JACK YELLEN	ROBBINS MUSIC CORP	VOC	:08
37	MARIA HINK LEY SULLO YACHT	RENZO ROSSELLINI	TITANUS S A	INST	1:08
38	BOIRE UN PETIT COUP	FELIX BOYER	PUBLIC DOMAIN	VOC	:30
39	LES CHEVALIERS DE LA TABLE RONDE	IGNOTO	PUBLIC DOMAIN	VOC	1:11
40	ON THE BANKS OF THE WABASH FAR AWAY	PAUL DRESSER	SHAWNEE PRESS Inc	VLS VOC	<div>1:39</div>
41	BACK HOME AGAIN IN INDIANA	JAMES F HANLEY- BALLARD MACDONALD	SHAPIRO-BERNSTEIN & CO INC	VLS VOC	<div>1:55</div>
42	BOIRE UN PETIT COUP	FELIX BOYER	PUBLIC DOMAIN	VOC	:21
43	VOGLIAMOCI TANTO BENE	RENATO RASCEL	KRAMER	INST	:38✓
44	MAMBO DELLO ZOO	CARLO SAVINA	TITANUS S A	INST	:37
45	ESTERNO TERRAZZA SPORTIVA-SLOW #1	CARLO SAVINA	TITANUS S A	INST	:14
46	ESTERNO TERRAZZA SPORTIVA-SLOW #2	CARLO SAVINA	TITANUS S A	INST	:54
47	ESTERNO TERRAZZA SPORTIVA-SLOW #3	CARLO SAVINA	TITANUS S A	INST	1:00
48	ESSERE BRILLI	CARLO SAVINA	TITANUS S A	INST	:13
49	LES JEUX SONT FAITS	MICHEL EMER	METROPOLITAINES DISCO	VOC	2:29
50	LES JEUX SONT FAITS	MICHEL EMER	METROPOLITAINES	INST	2:16
51	JANE E DINO ALLA RINGHIERA	RENZO ROSSELLINI	TITANUS S A	INST	2:05
52	ESTERNO YACHT E MOLO VOGLIAMOCI TANTO BENE	RENATO RASCEL	KRAMER	INST	1:34✓
53	ESTERNO PORTO - DINO SI ALLONTANA DAL MOLO	RENZO ROSSELLINI	TITANUS S A	INST	3:48
54	BACK HOME AGAIN IN INDIANA	JAMES F HANLEY- BALLARD MACDONALD	SHAPIRO-BERNSTEIN & CO INC	INST	<div>1:00</div>
55	ESTERNO TOLDA YACHT- BACK HOME AGAIN IN INDIANA	JAMES F HANLEY- BALLARD MACDONALD	SHAPIRO-BERNSTEIN & CO INC	VOC	<div>:08</div>

GUE SHEET #18,308
APRIL 24, 1959

(PRODUCER) TITANUS S. P. A.
RELEASED BY UNITED ARTISTS - U.S.A. AND CANADA
METRO GOLDWYN MAYER - WORLD MARKET

"THE NAKED MAJA"

1	INTRODUCTION	CARLO BAVINO	TITANUS	INST	1:13
2	BOLERO D'AMORE	A F LAVAGNINO- SIMONI	NORD SUD	INST	1:43
3	TAMBURI	A F LAVAGNINO	TITANUS	INST	1:10
4	BOLERO D'AMORE	A F LAVAGNINO- SIMONI	NORD SUD	INST	1:50
5	FANDANGO	A F LAVAGNINO	TITANUS	INST	1:15
6	GUITAR SOLO	A F LAVAGNINO	TITANUS	INST	1:20
7	GUITAR SOLO	A F LAVAGNINO	TITANUS	INST	1:22
8	BOLERO D'AMORE	A F LAVAGNINO- SIMONI	NORD SUD	INST	1:33
9	AVA GOES OUT	A F LAVAGNINO	TITANUS	INST	1:02
10	EMBRUJADO	A F LAVAGNINO- SIMONI	TITANUS	VOC	1:02
11	EMBRUJADO	A F LAVAGNINO	TITANUS	INST	1:08
12	CHURCH CHOIR	A F LAVAGNINO- SIMONI	TITANUS	VOC	1:30
13	RETINUE	A F LAVAGNINO	TITANUS	INST	1:42
14	GOYA	A F LAVAGNINO	TITANUS	INST	1:01
15	CHURCH GALLERY	A F LAVAGNINO	TITANUS	INST	1:33
16	GOYA SPEAKS	A F LAVAGNINO	TITANUS	INST	1:54
17	AVA	A F LAVAGNINO	TITANUS	INST	1:50
18	DANCE AT COURTY	A F LAVAGNINO	TITANUS	INST	1:03
19	GOYA TAKES JACKET	A F LAVAGNINO	TITANUS	INST	1:18
20	CARNIVAL	A F LAVAGNINO- SIMONI	TITANUS	VOC	1:58
21	CARNIVAL	A F LAVAGNINO- SIMONI	TITANUS	INST	1:20
22	GOYA PAINTS	A F LAVAGNINO	TITANUS	INST	1:59
23	NO TITLE	A F LAVAGNINO	TITANUS	INST	1:33
24	CARNIVAL	A F LAVAGNINO- SIMONI	TITANUS	VOC	1:19
25	THE QUEEN ENTERS	A F LAVAGNINO	TITANUS	INST	1:27
26	AVA DANCES	A F LAVAGNINO	TITANUS	INST	1:40
27	DANCE	A F LAVAGNINO	TITANUS	INST	1:25
28	CARNIVAL	A F LAVAGNINO	TITANUS	INST	1:15
29	GUITAR SOLO	A F LAVAGNINO	TITANUS	INST	1:23
30	BOLERO D'AMORE	A F LAVAGNINO- SIMONI	NORD SUD	INST	2:18
31	BOLERO D'AMORE	A F LAVAGNINO- SIMONI	NORD SUD	INST	1:58
32	EMBRUJADO	A F LAVAGNINO- SIMONI	TITANUS	INST	1:59
33	BOLERO D'AMORE	A F LAVAGNINO- SIMONI	NORD SUD	INST	3:56
34	GOYA'S HOUSE	A F LAVAGNINO	TITANUS	INST	1:11
35	CLOSE-UP GOYA	A F LAVAGNINO	TITANUS	INST	1:22
36	BOLERO D'AMORE	A F LAVAGNINO- SIMONI	NORD SUD	INST	1:20
37	EMBRUJADO	A F LAVAGNINO- SIMONI	TITANUS	INST	1:46
38	GOYA SITS DOWN	A F LAVAGNINO	TITANUS	INST	1:34

39	EMBRUJADO	A F LAVAGNINO-SIMONI	TITANUS	INST	:08
40	GODOY ENTERS	A F LAVAGNINO	TITANUS	INST	:13
41	AVA WALKS	A F LAVAGNINO	TITANUS	INST	:40
42	GODOY-AVA	A F LAVAGNINO	TITANUS	INST	1:08
43	GOYA SEES GLOVES	A F LAVAGNINO	TITANUS	INST	:47
44	BOLERO D'AMORE	A F LAVAGNINO-SIMONI	NORD SUD	INST	1:30
45	DIALOGUE GOYA/AVA	A F LAVAGNINO	TITANUS	INST	1:90
46	AVA WATCHES	A F LAVAGNINO	TITANUS	INST	:52
47	BOLERO D'AMORE	A F LAVAGNINO-SIMONI	NORD SUD	INST	:13
48	BOLERO D'AMORE	A F LAVAGNINO-SIMONI	NORD SUD	INST	:29
49	INTERIOR OF INN	A F LAVAGNINO	TITANUS	INST	:33
50	BOLERO D'AMORE	A F LAVAGNINO-SIMONI	NORD SUD	INST	1:59
51	CONVALESCENCE	A F LAVAGNINO	TITANUS	INST	:30
52	TAMBU!	A F LAVAGNINO	TITANUS	INST	:20
53	PRISON	A F LAVAGNINO	TITANUS	INST	:23
54	DANCE AT COURT	A F LAVAGNINO	TITANUS	INST	:50
55	THE QUEEN LEAVES	A F LAVAGNINO	TITANUS	INST	:23
56	GONG	A F LAVAGNINO	TITANUS	INST	:0
57	GODOY'S OFFICE	A F LAVAGNINO	TITANUS	INST	3:00
58	THE QUEEN AND GODOY HEAR A KNOCK	A F LAVAGNINO	TITANUS	INST	:35
59	THE FRENCH ENTER	A F LAVAGNINO	TITANUS	INST	:25
60	BOLERO D'AMORE	A F LAVAGNINO-SIMONI	NORD SUD	INST	1:10
61	DRUMS OF NAPOLEON	A F LAVAGNINO	TITANUS	INST	:20
62	AVA IN BED	A F LAVAGNINO	TITANUS	INST	:50
63	WILL	A F LAVAGNINO	TITANUS	INST	:19
64	MAN HANGING	A F LAVAGNINO	TITANUS	INST	1:02
65	ENTER GOYA				
66	BOLERO D'AMORE	A F LAVAGNINO-SIMONI	NORD SUD	INST	3:55
67	EMBRUJADO	A F LAVAGNINO-SIMONI	TITANUS	INST	2:30
68	BOLERO D'AMORE	A F LAVAGNINO-SIMONI	NORD SUD	INST	1:07

FOR ALL ITEMS CREDITED ABOVE TO TITANUS, PLEASE NOTE THAT RIGHTS THERE TO ARE
CONTROLLED BY UNITED ARTISTS MUSIC CO., INC. FOR U.S.A. AND CANADA.

MUSIC CUE SHEETFEBRUARY 27th, 1968.TITLE OF PHOTOPLAY: "SUBMARINE X-1"PRODUCED BY: MIRISCH FILMS LTD.RELEASED: UNITED ARTISTS CORPN.RECORDED AT: OLYMPIC SOUND STUDIOS

29th Dec. 1967

20th Jan. 1968

25th Jan. 1968

12th Feb. 1968

MUSIC DIRECTOR: RON GOODWIN

REEL	CUE	TITLE	COMPOSER	PUBLISHER	LENGTH USED
1.	1.	"Submarine X-1" Main Title	Ron Goodwin	United Artists Music Corp.	4:37 1/2 B.G. Inst.
	2.	"Secret Arrival"	" "	" "	1:57 1/2 B.G. Inst.
2.	1.	"Training Begins"	" "	" "	1:10 B.G. Inst.
	2.	"Quentin's Rescue"	" "	" "	1:36 B.G. Inst.
3.	1.	"Quentin's Bolt"	" "	" "	0:39 1/2 B.G. Inst.
	2.	"Bolt Hits Mirror"	" "	" "	2:20 B.G. Inst.
		"Training Begins"	" "	" "	
	3.	"X-Craft Introduced"	" "	" "	0:08 1/2 B.G. Inst.
	4.	"X-Craft Dives"	" "	" "	1:37 1/2 B.G. Inst.
4.	1.	"X-3 Through Net"	" "	" "	1:37 1/2 B.G. Inst.
	2.	"X-3 Hits Net"	" "	" "	1:49 1/2 B.G. Inst.
5.	1.	"X-3 Recovered"	" "	" "	0:59 1/2 B.G. Inst.
	2.	"German Parachutist"	" "	" "	1:57 1/2 B.G. Inst.
6.	1.	"Defeat"	" "	" "	1:02 1/2 B.G. Inst.
	2.	"Bolton Defeats Parachutist"	" "	" "	1:03 1/2 B.G. Inst.
	3.	"Operation Jonah"	" "	" "	1:36 1/2 B.G. Inst.
	4.	"Jonah's Journey"	" "	" "	0:19 1/2 B.G. Inst.
7.	1.	"Minefield"	" "	" "	3:27 1/2 B.G. Inst.
	2.	"X-1 Escapes"	" "	" "	2:10 1/2 B.G. Inst.
	3.	"Sogne Fjord"	" "	" "	1:47 1/2 B.G. Inst.
8.	1.	"E-Boat Patrol"	" "	" "	4:14 B.G. Inst.

continued.....

MUSIC CUE SHEET: "SUBMARINE X-1"

February 27th, 1968

<u>REEL</u>	<u>CUE</u>	<u>TITLE</u>	<u>COMPOSER</u>	<u>PUBLISHER</u>	<u>LENGTH USED</u>
8.	2.	"Depth Charge Attack"	Ron Goodwin	United Artists Music Library	4:32 $\frac{1}{2}$ B.G. Inst.
9.	1.	"Lindendorf"	" "	" "	0:39 $\frac{1}{2}$ B.G. Inst.
	2.	"Target Directly Above"	" "	" "	1:00 B.G. Inst.
	3.	"Hesitation"	" "	" "	0:57 $\frac{1}{2}$ B.G. Inst.
	4.	"Homeward Bound" - End Titles.	" "	" "	2:16 B.G. Inst.

W. J. [Signature]

Music Rights

Program Title

SUMMER OF MY GERMAN SOLDIER

Air Date

10/30/78

Time

9:00 PM

Pre-Recording Date

8/21/78

Title of Composition

Composer, Publisher, Record Label & No.

Performers and Manner of Representation

Set and Costumes

Accentuate the Positive

64"

Mercer & Arlen
(Famous & Harwin)
ASCAP

Bkgrnd. Vocal

1M1

35½"

Stanley Myers*

Bkgrnd. Instrm

PRS

1M1 Repeat

35"

Stanley Myers

Bkgrnd. Instrm

Besame Mucho 0730500

37"

Skyfor & Velazquez
(Peer) - BMI

Bkgrnd. Vocal

2M1

27½"

Stanley Myers

Bkgrnd. Instrm

2M1A

36"

Stanley Myers

Bkgrnd. Instrm

3M1

94"

Stanley Myers

Bkgrnd. Instrm

3M2

55½"

Stanley Myers

Bkgrnd. Instrm

Poiciana

36"

Bernie & Simon
(Chappell) - ASCAP

Bkgrnd. Vocal

4M1

88"

Stanley Myers

Bkgrnd. Instrm

4M2

23½"

Stanley Myers

Bkgrnd. Instrm

4M3

19"

Stanley Myers

Bkgrnd. Instrm

5M1

45½"

Stanley Myers

Bkgrnd. Instrm

5M2

51½"

Stanley Myers

Bkgrnd. Instrm

Five Foot Two

48"

Henderson, Lewis &
Young
(Feist & Warlock)
ASCAP

Vocal Feature

5M1

130"

Stanley Myers

Bkgrnd. Instrm

NOTE: NO MUSIC MAY BE PERFORMED WITHOUT PRIOR CLEARANCE FROM MUSIC RIGHTS

1. Fill out all information in duplicate.
2. Send one (1) copy to Music Rights before taping or Broadcasting date.
3. Send second copy to Music Rights immediately after Taping or Broadcasting date with check mark at left for every composition performed, adding any composition not previously listed.
4. Cross out compositions listed but not performed.
5. For films scored outside NBC, obtain and forward music cue sheet to Music Rights.
6. If no music performed, submit with notation "No Music Used".

Signed (Person Submitting)

Maurice P. Aron

Title

Ass't. to the producer

Date

Nov. 17, '78

TO: Music Rights		Program Title SUMMER OF MY GERMAN SOLDIER	
Air Date 10/30/78		Time 9:00 PM	Pre-Recording Date 8/21/78
Title of Composition	Composer, Publisher, Record Label & No.	Performers and Manner of Representation	Set and Costumes
6M2 67"	Stanley Myers *	Bkgrnd. Instrm	
6M3 (8M2 used) 56"	Stanley Myers	Bkgrnd. Instrm	
8M1 35½"	Stanley Myers	Bkgrnd. Instrm	
8M2 113"	Stanley Myers	Bkgrnd. Instrm	
8M3 47"	Stanley Myers	Bkgrnd. Instrm	
8M4 31½"	Stanley Myers	Bkgrnd. Instrm	
8M3 (Repeat) 47"	Stanley Myers	Bkgrnd. Instrm	
9M1 111"	Stanley Myers	Bkgrnd. Instrm	
10M1 91"	Stanley Myers	Bkgrnd. Instrm	
10M2 219"	Stanley Myers	Bkgrnd. Instrm	
10M3 51"	Stanley Myers	Bkgrnd. Instrm	

* Mr. Myers is a member of the P.S.S. (Performing Rights Society of England.)

NOTE: NO MUSIC MAY BE PERFORMED WITHOUT PRIOR CLEARANCE FROM MUSIC RIGHTS

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2. Send one (1) copy to Music Rights before taping or Broadcasting date.
3. Send second copy to Music Rights immediately after Taping or Broadcasting date with check mark at left for every composition performed, adding any composition not previously listed.
4. Cross out compositions listed but not performed.
5. For films scored outside NBC, obtain and forward music cue sheet to Music Rights.
6. If no music performed, submit with notation "No Music Used".

Signed (Person Submitting) <i>W. C. Hunt</i>	Title P.S.S. to the producer	Date 11/17/78
---	---------------------------------	------------------

OP-602 (6/78)

TITLE: THIS IS AMERICA

DATE: 01-01-1977

EPISODE: 1

PAGE 1

TITLE OF EACH COMPOSITION
OR CUE

COMPOSER

PUBLISHER

TIME

AMERICA THE BEAUTIFUL	I. BERLIN		2.09
STREET PARADE	E. VARDI	EMVAR PUB.	0.56
CALIFORNIA	E. VARDI	EMVAR PUB.	2.27
MAJORETTES	E. VARDI	EMVAR PUB.	0.35
TANNHAUSER	R. WAGNER	P.D.	2.26
CAR WASH	E. VARDI	EMVAR PUB.	2.50
STREET VIEW	E. VARDI	EMVAR PUB.	0.30
PARK AVENUE	E. VARDI	EMVAR PUB.	3.45
FAR WEST	E. VARDI	EMVAR PUB.	0.53
BOUNTY HUNTER	E. VARDI	EMVAR PUB.	1.17
PRAIRIE VIEW	E. VARDI	EMVAR PUB.	2.07
DOG BROTHEL	E. VARDI	EMVAR PUB.	1.27
WOMEN'S EXERCISE	E. VARDI	EMVAR PUB.	1.54
YOUNG NUNS SINGING	E. VARDI	EMVAR PUB.	1.02
MARTIAL ARTS FOR NUNS	E. VARDI	EMVAR PUB.	1.22
ST LOUIS MO	E. VARDI	EMVAR PUB.	0.15
AMERICA THE BEAUTIFUL	I. BERLIN		1.19
N.Y. MANHATTAN	E. VARDI	EMVAR PUB.	2.43
FAST FOOD	E. VARDI	EMVAR PUB.	1.28
FASHION SHOW	E. VARDI	EMVAR PUB.	0.29
OBESE DANCE	E. VARDI	EMVAR PUB.	0.27
EATING WORMS	E. VARDI	EMVAR PUB.	0.33
WORMS CAPITAL	E. VARDI	EMVAR PUB.	2.17

RETURN TO: BROADCAST MUSIC, INC.
 ATTENTION: PAUL ROSENTHAL
 320 West 57th Street
 New York, New York 10019

TITLE: THIS IS AMERICA

DATE: 01-01-1977

EPISODE: 1
PAGE 2TITLE OF EACH COMPOSITION
OR CUE

COMPOSER

PUBLISHER

TIME

MADISON AVENUE	E. VARDI	EMVAR PUB.	2.25
PARACHUTING	E. VARDI	EMVAR PUB.	1.00
NUDIST WEDDING	HERE COMES THE BRIDE	P.D.	0.36
STRIP TEASE	E. VARDI	EMVAR PUB.	1.07
MEN'S STRIP	E. VARDI	EMVAR PUB.	2.55
OFF THE RACK FASHION	E. VARDI	EMVAR PUB.	2.31
FAST ROCK	E. VARDI	EMVAR PUB.	0.18
PLATO'S RETREAT	E. VARDI	EMVAR PUB.	3.12
SMALL ROOMS	E. VARDI	EMVAR PUB.	1.25
HOLLYWOOD	E. VARDI	EMVAR PUB.	1.57
SAN FRANSISCO	E. VARDI	EMVAR PUB.	0.27
PARAPLEGICS	E. VARDI	EMVAR PUB.	4.00
LIVE AND LET DIE	PAUL MCCARTNEY	*	2.26
GUNS	E. VARDI	EMVAR PUB.	2.59
VIOLENC	E. VARDI	EMVAR PUB.	0.52
JAIL	E. VARDI	EMVAR PUB.	1.00
IMMIGRANTS	E. VARDI	EMVAR PUB.	0.42
AMERICA THE BEAUTIFUL	I. BERLIN		2.00

RETURN TO: BROADCAST MUSIC, INC.
 ATTENTION: PAUL ROSENTHAL
 320 West 57th Street
 New York, New York 10019

F000245

REVISED

Date February 6, 1961Prod. No. #8559

COLUMBIA PICTURES CORPORATION

711 Fifth Avenue
New York, New York

Musical Compositions Recorded in

A PRODUCTION ENTITLED: "THE TINGLER" (Feature)~~(Trailer)~~PRODUCED BY: WILLIAM CASTLE PRODUCTIONS

Recorded by Columbia Pictures Corporation at 1438 No. Gower Street, Hollywood, California.

Columbia Pictures Corporation

By Al Fisher
Music Department

Reel 1

1. Title of Composition EMBLEM TIME :15-1/2
COMPOSER Von Dexter BMI PUBLISHER GOWER MUSIC INC.
VOCAL OR INSTRUMENTAL I BACKGROUND OR VISUAL B
PARTIAL OR ENTIRE E LICENSE SECURED COLUMBIA SYNC RTS
2. Title of Composition "THE TINGLER" - MAIN TITLE TIME 1:27
COMPOSER Stanley Styne, ASCAP and George W. Duning, ASCAP PUBLISHER COLUMBIA PIC MUSIC CORP.
VOCAL OR INSTRUMENTAL I BACKGROUND OR VISUAL B
PARTIAL OR ENTIRE E LICENSE SECURED COLUMBIA SYNC RTS
COMBINATION CUE:
3. Title of Composition NOT MANY LIVES TIME 1:28-1/2
COMPOSER Von Dexter BMI PUBLISHER GOWER MUSIC INC.
VOCAL OR INSTRUMENTAL I BACKGROUND OR VISUAL B
PARTIAL OR ENTIRE P LICENSE SECURED COLUMBIA SYNC RTS
AND
4. Title of Composition "THE TINGLER" TIME --
COMPOSER Stanley Styne, ASCAP and George W. Duning, ASCAP PUBLISHER COLUMBIA PIC MUSIC CORP.
VOCAL OR INSTRUMENTAL I BACKGROUND OR VISUAL B
PARTIAL OR ENTIRE E LICENSE SECURED COLUMBIA SYNC RTS

Reel 2

4. X. Title of Composition IN THE BAG TIME 1:33
COMPOSER Von Dexter BMI PUBLISHER GOWER MUSIC INC.
VOCAL OR INSTRUMENTAL I BACKGROUND OR VISUAL B
PARTIAL OR ENTIRE E LICENSE SECURED COLUMBIA SYNC RTS
5. X. Title of Composition LUCY'S STAIRCASE TIME :31
COMPOSER Von Dexter BMI PUBLISHER GOWER MUSIC INC.
VOCAL OR INSTRUMENTAL I BACKGROUND OR VISUAL B
PARTIAL OR ENTIRE E LICENSE SECURED COLUMBIA SYNC RTS
6. X. Title of Composition FRIKITT TIME 1:11
COMPOSER Von Dexter BMI PUBLISHER GOWER MUSIC INC.
VOCAL OR INSTRUMENTAL I BACKGROUND OR VISUAL B
PARTIAL OR ENTIRE E LICENSE SECURED COLUMBIA SYNC RTS

Reel 3 "THE TINGLER" #8559

Page #2

1 Title of Composition STANDING IN THE PARK TIME 1:19-1/2
 7 COMPOSER Von Dexter BMI
 PUBLISHER GOWER MUSIC INC.
 VOCAL OR INSTRUMENTAL I BACKGROUND OR VISUAL B
 PARTIAL OR ENTIRE E LICENSE SECURED COLUMBIA SYNC RTS

8 Title of Composition GO ON TIME 2:34-1/2
 COMPOSER Von Dexter BMI
 PUBLISHER GOWER MUSIC INC.
 VOCAL OR INSTRUMENTAL I BACKGROUND OR VISUAL B
 PARTIAL OR ENTIRE E LICENSE SECURED COLUMBIA SYNC RTS

9 Title of Composition TREMBLING TIME 2:32
 COMPOSER Von Dexter BMI
 PUBLISHER GOWER MUSIC INC.
 VOCAL OR INSTRUMENTAL I BACKGROUND OR VISUAL B
 PARTIAL OR ENTIRE E LICENSE SECURED COLUMBIA SYNC RTS

10 Title of Composition YOU TELL ME TIME 1:03
 COMPOSER Von Dexter BMI
 PUBLISHER GOWER MUSIC INC.
 VOCAL OR INSTRUMENTAL I BACKGROUND OR VISUAL B
 PARTIAL OR ENTIRE E LICENSE SECURED COLUMBIA SYNC RTS

Reel 4
 11 Title of Composition WORRIED TIME :18
 COMPOSER Von Dexter BMI
 PUBLISHER GOWER MUSIC INC.
 VOCAL OR INSTRUMENTAL I BACKGROUND OR VISUAL B
 PARTIAL OR ENTIRE E LICENSE SECURED COLUMBIA SYNC RTS

12 Title of Composition WHAT'S DOING TIME 3:23
 COMPOSER Von Dexter BMI
 PUBLISHER GOWER MUSIC INC.
 VOCAL OR INSTRUMENTAL I BACKGROUND OR VISUAL B
 PARTIAL OR ENTIRE E LICENSE SECURED COLUMBIA SYNC RTS

13 Title of Composition BLURRING VISION TIME 1:50
 COMPOSER Von Dexter BMI
 PUBLISHER GOWER MUSIC INC.
 VOCAL OR INSTRUMENTAL I BACKGROUND OR VISUAL B
 PARTIAL OR ENTIRE E LICENSE SECURED COLUMBIA SYNC RTS

Reel 5
 14 Title of Composition MAKING PROGRESS TIME 2:11-1/2
 COMPOSER Von Dexter BMI
 PUBLISHER GOWER MUSIC INC.
 VOCAL OR INSTRUMENTAL I BACKGROUND OR VISUAL B
 PARTIAL OR ENTIRE E LICENSE SECURED COLUMBIA SYNC RTS

15 Title of Composition MUTE GOODBYE TIME :22-1/2
 COMPOSER Von Dexter BMI
 PUBLISHER GOWER MUSIC INC.
 VOCAL OR INSTRUMENTAL I BACKGROUND OR VISUAL B
 PARTIAL OR ENTIRE E LICENSE SECURED COLUMBIA SYNC RTS

16 Title of Composition RESTLESS TIME 4:06
 COMPOSER Von Dexter BMI
 PUBLISHER GOWER MUSIC INC.
 VOCAL OR INSTRUMENTAL I BACKGROUND OR VISUAL B
 PARTIAL OR ENTIRE E LICENSE SECURED COLUMBIA SYNC RTS

"THE TINGLER" #8559

Page #3

Reel 6

16 Title of Composition ALIVE OR NOT ALIVE TIME 3:39
 17 COMPOSER Von Dexter BMI
 PUBLISHER GOWER MUSIC INC.
 VOCAL OR INSTRUMENTAL I
 BACKGROUND OR VISUAL B
 PARTIAL OR ENTIRE E
 LICENSE SECURED COLUMBIA SYNC RTS

Reel 7

18 Title of Composition MYSTERIOUS WALK TIME :50
 18 COMPOSER Von Dexter BMI
 PUBLISHER GOWER MUSIC INC.
 VOCAL OR INSTRUMENTAL I
 BACKGROUND OR VISUAL B
 PARTIAL OR ENTIRE E
 LICENSE SECURED COLUMBIA SYNC RTS

19 Title of Composition A LITTLE RESTLESS TIME 1:20
 19 COMPOSER Von Dexter BMI
 PUBLISHER GOWER MUSIC INC.
 VOCAL OR INSTRUMENTAL I
 BACKGROUND OR VISUAL B
 PARTIAL OR ENTIRE E
 LICENSE SECURED COLUMBIA SYNC RTS

20 Title of Composition JUST THINGS TIME 1:08-1/2
 20 COMPOSER Von Dexter BMI
 PUBLISHER GOWER MUSIC INC.
 VOCAL OR INSTRUMENTAL I
 BACKGROUND OR VISUAL B
 PARTIAL OR ENTIRE E
 LICENSE SECURED COLUMBIA SYNC RTS

21 Title of Composition OUT OF THE CAGE TIME :21-1/2
 21 COMPOSER Von Dexter BMI
 PUBLISHER GOWER MUSIC INC.
 VOCAL OR INSTRUMENTAL I
 BACKGROUND OR VISUAL B
 PARTIAL OR ENTIRE E
 LICENSE SECURED COLUMBIA SYNC RTS

22 Title of Composition THEATRE PART 1 TIME :28-1/2
 22 COMPOSER Von Dexter BMI
 PUBLISHER GOWER MUSIC INC.
 VOCAL OR INSTRUMENTAL I
 BACKGROUND OR VISUAL B
 PARTIAL OR ENTIRE E
 LICENSE SECURED COLUMBIA SYNC RTS

Reel 8

23 Title of Composition THEATRE EPISODE TIME :38
 23 COMPOSER Von Dexter BMI
 PUBLISHER GOWER MUSIC INC.
 VOCAL OR INSTRUMENTAL I
 BACKGROUND OR VISUAL B
 PARTIAL OR ENTIRE E
 LICENSE SECURED COLUMBIA SYNC RTS

24 Title of Composition PIANO I. TIME 3:12-1/2
 24 COMPOSER Von Dexter BMI
 PUBLISHER GOWER MUSIC INC.
 VOCAL OR INSTRUMENTAL I
 BACKGROUND OR VISUAL B
 PARTIAL OR ENTIRE E
 LICENSE SECURED COLUMBIA SYNC RTS

25 Title of Composition TINGLER'S SHADOW TIME :19
 25 COMPOSER Von Dexter BMI
 PUBLISHER GOWER MUSIC INC.
 VOCAL OR INSTRUMENTAL I
 BACKGROUND OR VISUAL B
 PARTIAL OR ENTIRE E
 LICENSE SECURED COLUMBIA SYNC RTS

26 Title of Composition PIANO II. TIME 1:10-1/2
 26 COMPOSER Von Dexter BMI
 PUBLISHER GOWER MUSIC INC.
 VOCAL OR INSTRUMENTAL I
 BACKGROUND OR VISUAL B
 PARTIAL OR ENTIRE E
 LICENSE SECURED COLUMBIA SYNC RTS

"THE TINGLER" #8559

Page #4

27	Title of Composition	PROJECTION BOOTH	TIME	:57-1/2
	COMPOSER	Von Dexter BMI		
	VOCAL OR INSTRUMENTAL	I	PUBLISHER	GOWER MUSIC INC.
	PARTIAL OR ENTIRE	E	BACKGROUND OR VISUAL	B
			LICENSE SECURED	COLUMBIA SYNC RTS
28	Title of Composition	OLLIE SWINGS	TIME	1:29
	COMPOSER	Von Dexter BMI		
	VOCAL OR INSTRUMENTAL	I	PUBLISHER	GOWER MUSIC INC.
	PARTIAL OR ENTIRE	E	BACKGROUND OR VISUAL	B
			LICENSE SECURED	COLUMBIA SYNC RTS
29	Title of Composition	THE END	TIME	:10
	COMPOSER	Von Dexter BMI		
	VOCAL OR INSTRUMENTAL	I	PUBLISHER	GOWER MUSIC INC.
	PARTIAL OR ENTIRE	E	BACKGROUND OR VISUAL	B
			LICENSE SECURED	COLUMBIA SYNC RTS
--	Title of Composition		TIME	
	COMPOSER			
	VOCAL OR INSTRUMENTAL		PUBLISHER	
	PARTIAL OR ENTIRE		BACKGROUND OR VISUAL	
			LICENSE SECURED	
--	Title of Composition		TIME	
	COMPOSER			
	VOCAL OR INSTRUMENTAL		PUBLISHER	
	PARTIAL OR ENTIRE		BACKGROUND OR VISUAL	
			LICENSE SECURED	
--	Title of Composition		TIME	
	COMPOSER			
	VOCAL OR INSTRUMENTAL		PUBLISHER	
	PARTIAL OR ENTIRE		BACKGROUND OR VISUAL	
			LICENSE SECURED	
--	Title of Composition		TIME	
	COMPOSER			
	VOCAL OR INSTRUMENTAL		PUBLISHER	
	PARTIAL OR ENTIRE		BACKGROUND OR VISUAL	
			LICENSE SECURED	
--	Title of Composition		TIME	
	COMPOSER			
	VOCAL OR INSTRUMENTAL		PUBLISHER	
	PARTIAL OR ENTIRE		BACKGROUND OR VISUAL	
			LICENSE SECURED	
--	Title of Composition		TIME	
	COMPOSER			
	VOCAL OR INSTRUMENTAL		PUBLISHER	
	PARTIAL OR ENTIRE		BACKGROUND OR VISUAL	
			LICENSE SECURED	

FILM

Exhibit No. B-19R

(S)

"MEET THE METEOR" (GILLIGAN'S ISLAND)

32-12989-3
SIG: BALLAD OF GILLIGAN'S ISLE
(M&E) (BKG VOC) (1:35)

SHERWOOD SCHWARTZ
GEORGE WYLE

17
UNITED ARTISTS MUSIC INC. —

32-12989-3
BALLAD OF GILLIGAN'S ISLE (BKG) /
(2X) (:18)
S.

SHERWOOD SCHWARTZ
GEORGE WYLE

Bgg-0-T-18
UNITED ARTISTS MUSIC INC. —

~~JUDY'S BLUES (2X) (:18)~~

~~KIRBY JOHNSON, EDDIE WADE
GEORGE PATTERSON~~

~~ESTEEM MUSIC~~

• ~~MOSQUITO ROCK (:10)~~

~~KIRBY JOHNSON, EDDIE WADE
GEORGE PATTERSON~~

~~ESTEEM MUSIC~~

~~BKG MUSIC (14X) (3:20)~~

~~D.B. RAY~~

~~ESTEEM MUSIC~~

37-8-19457
BKG MUSIC (2X) (2:06)

GERALD FRIED

Bgg-0-T-2-06
UNITED ARTISTS MUSIC INC.

~~BKG MUSIC (3X) (:10)~~

~~J.T. WILLIAMS~~

~~ESTEEM MUSIC~~

(R)



CAROL
BURNETT
and
FRIENDS #50

FILM

A

DO NOT TAKE

FOR MASTER SUMMARY USE ONLY
COPY STAMPED & CODED IN P.20

MUSIC CLEARANCE

INFORMATION FOR MUSIC CLEARANCE

PROGRAM NO. T-805

#50

Musical Compositions &
Description of Use

Time Writers

Publisher

BMI or
ASCAP

Background for Carol's Cartoon

by: "Carol's Theme" (m+e)
33-17842-8

:15 Joe Hamilton

Jocar

BMI

Sketch: Carol & Sis

Playon: "Youngster"

:07 Peter Matz

Jocar

BMI

"I've Got You Under My Skin"

:10 Cole Porter

Chappell

ASCAP

Playoff: "Rogemover"

:05 Peter Matz

Jocar

BMI

Sketch: Nora Desmond Roast

Playon: "Hamakter"

:08 Peter Matz

Jocar

BMI

Playoff: "Hamakter"

:06 Peter Matz

Jocar

BMI

Closing: "Carol's Theme"

:45 Joe Hamilton

Jocar

BMI

Bill Music (4x)(126)

Peter Matz

JOCAR

MUSIC CLEARANCE SHEET

FILM

☒ CTN

☐ CTS

FOR MASTER SUMMARY USE ONLY
COPY STAMPED & CODED IN RED
ALICE ("ALICE BEATS THE CLOCK")

DATE SUNDAY
JANUARY 27, 1980

TIME
9:00 - 9:30 PM

PROGRAM
166946

CHECK
()

MUSICAL COMPOSITIONS & DESCRIPTION OF USE

WRITERS

PUBLISHERS

OPENING THEME: 30-25553-0
VOCAL THERE'S A NEW GIRL IN TOWN

DAVID SHIRE,
M. & A. BERGMAN

WARNER-
TAMERLANE/
WB MUSIC

CAST MEMBER - PARTIAL USE:
VOCAL UNION LABEL

57-2155-3 F

(NOT CLEARED)

BACKGROUNDS:

INST PLAYON

DAVID SHIRE

WARNER-TAMERLANE

INST PLAYOFF

DAVID SHIRE

WARNER-TAMERLANE

CLOSING THEME:

INST THERE'S A NEW GIRL IN TOWN

DAVID SHIRE,
M. & A. BERGMAN

WARNER-
TAMERLANE/
WB MUSIC

Original

30/0

UNLESS DESIGNATED OTHERWISE, THE ABOVE MUSICAL COMPOSITIONS (AS PUBLISHED) ARE CLEARED BY US FOR NON-DRAMATIC PERFORMANCE

DU

MUSIC CLEARANCE SECTION

ONLY THE MUSICAL COMPOSITIONS CHECKED ABOVE WERE PERFORMED ON THE PROGRAM AS DESCRIBED.

PRODUCER

DATE



CAROL
BURNETT
and
FRIENDS #51

FILM

A

FOR MASTER SUMMARY USE ONLY
COPY STAMPED & CODED IN RED

DO NOT TAKE

MUSIC CLEARANCE

INFORMATION FOR MUSIC CLEARANCE

PROGRAM NO. T-806

#51

Musical Compositions &
Description of Use

Time Writers

Publisher

BMI or
ASCAP

Background for Carol's Cartoon

by "Carol's Theme" (M+E)

:15 Joe Hamilton

Jocar

BMI

Sketch: The Broken Mergor

Playon & Bkgr: "A Silly Thing"

:33 Peter Matz

Jocar

BMI

Play: "The Way We Were"

:41 M. Hamlich

Colgems

ASCAP

Playoff: "Dirty Movie Music"

:07 Peter Matz

Jocar

BMI

TV Commercials

Belgar's Coffee

Playon: "Bing Ding"

:04 Peter Matz

Jocar

BMI

Playoff: "Bing Bong"

:02 Peter Matz

Jocar

BMI

Sineoff Tablets

Playoff: "Cheezit"

:03 Peter Matz

Jocar

BMI

Sketch: Poopie La Moka

Playon & Bkgr: "Poopi One"

:37 Peter Matz

Jocar

BMI

Sting: "Stings by Matz" 2X

:04 Peter Matz

Jocar

BMI

Bkgr: "Poopi Two"

:32 Peter Matz

Jocar

BMI

Sting: "French Sting"

:04 Peter Matz

Jocar

BMI

"For Every Man There's A Woman"

:15 H. Arlen/L. Robin

Harwin

ASCAP

Playoff: "Poopi Out"

:07 Peter Matz

Jocar

BMI

Closing: "Carol's Theme"

:45 Joe Hamilton

Jocar

BMI

BKG MUSIC (13x)(2:13) PETER MATZ JOCAR

FILM

FOR MASTER SUMMARY USE ONLY
COPY STAMPED & CODED IN REEL

"CHEAPER TO KEEP HER" (FEATURE) (1980)

~~"PEER SINT SUITE" (1:32)~~

~~EDWARD CRUIC~~

~~PUBLIC DOMAIN~~

WES 33-8-5833-8
"CHEAPER TO KEEP HER" (3:00)

DICK HALLIGAN (BMI)
CAROL CONNERS (BMI)

CHECK OUT MUSIC INC.

31-2222-1

"ALICE BLUE GOWN" (VOC)

~~PUBLIC DOMAIN~~

CODED 49-37953-4
"I WANT TO BE SEDUCED" (VOC)

GARY TIGERMAN

WARNER TAMERLANE INC

38-20811-3
"HAVEN'T YOU HEARD" (VOC)

(COMP) PATRICE RUSHEN
(LYR) CHARLES MINNS JR &
FREDDIE WASHINGTON

BABY FINGERS MUSIC J

31-10378-7
"ALFIE" (3:05)

BURT BACHARACH &
HAL DAVID

FAMOUS MUSIC CORP

~~"DINE KLINE NACHT MUSIC" (2:03)~~

~~MOZART~~

~~PUBLIC DOMAIN~~

LOVE
"LOVE CAME UNEXPECTEDLY" (1:37)

DICK HALLIGAN

CHECK OUT MUSIC INC.

WES 33-8-5833-8
"LOVE CAME UNEXPECTEDLY" (VOC)

DICK HALLIGAN
CAROL CONNERS

CHECK OUT MUSIC INC.

~~"BACKGROUND MUSIC (31:12) (31X)"~~

~~DICK HALLIGAN (BMI)~~

~~CHECK OUT MUSIC INC.~~

FILM

DROWNING POOL (WARNER BROS-MOVIE) (1975)

41-3451-0

beg

1) KILLING ME SOFTLY WITH HIS SONG
(6X) (7:48)

NORMAN GIMBEL
CHARLES FOX

FOX GIMBEL PROD. INC.

~~BKG MUSIC (21X) (28:10) (20:49)~~

~~MICHAEL SMALL~~

~~WARNER TAMERLANE PUB. CORP.~~

EVERY DAY I'M SO LONESOME (VV) (1:25)

JAMES FONTENOT

WB MUSIC CORP.

MARGIE (VV) (1:10) 43-2986-4

CON CONRAD, J R ROBINSON
BENNY DAVIS

FISHER MUSIC CORP.
MILLS MUSIC CORP.

~~BKG MUSIC (2X) (4:12)~~

~~CHARLES FOX~~

~~WARNER TAMERLANE PUB. CORP.~~

FILM

PREMONITION

(1975 FEATURE - AVCO EMBASSY PICTURES)

OPENING THEME "A"

HENRY MOLLIICONE

GALAXY FILM PROD. INC.

BUS DOWN HILL (VOCAL)

(15)

32-26684-2

OPENING THEME "B"

HENRY MOLLIICONE

GALAXY FILM PROD. INC.

DESERTED CARNIVAL (VOC)

(15)

34-22009-5

~~BKG. MUSIC (24X) (26:13)~~

~~HENRY MOLLIICONE~~

~~GALAXY FILM PROD. INC.~~

~~BKG. MUSIC (8X) (5:35)~~

~~PHIL SMILEY~~

~~GALAXY FILM PROD. INC.~~

1908

REBUTTAL TESTIMONY OF DAVID E. BLACK

Mr. Chairman, Commissioner Agüero, my name is David E. Black. I am Acting Chairman of the Department of Economics at the University of Delaware, and I appear on behalf of Broadcast Music, Inc. ("BMI"). My background and qualifications are listed in my written direct testimony in this proceeding. The purpose of my rebuttal testimony today is to highlight the lack of probative value of the surveys submitted by ASCAP in this proceeding from an economic and statistical standpoint.

From an economic and statistical point of view the two principal reasons that the Tribunal should not rely on ASCAP's surveys are as follows: First, the surveys cannot be verified by BMI or by the Tribunal. Second, and perhaps more important, there is no economic basis in the music marketplace to justify the use of ASCAP royalty distribution weights for the purpose of measuring the value of music used in distant signal programming. I will discuss each reason in turn.

I. ASCAP's Surveys are Unreliable.

A. The Surveys Are Not Verifiable. All four of ASCAP's surveys rely on ASCAP's abstract credits. In other words, abstract credit computations are the unit of

value for estimating the value of the music appearing on the surveyed stations in Exhibits No. 6 and 7, as well as the surveyed programs in Exhibits No. 10, 11 and 12. These abstract credit computations are derived through a variety of methods, not all of which have been made available in this proceeding. In general, they derive from the application of the weighting rules to music performance data obtained by ASCAP from cue sheets and tapes.^{1/}

For example, under the ASCAP weighting rules, in order to determine the appropriate percentages of a credit to apply to any feature, background or theme work listed in a cue sheet, one must know the prior performance history of the work as it appeared in either the ASCAP television or radio surveys. Putting aside the issue of the relevance of such information, such historical information is quite clearly not available to BMI or the Tribunal.

In addition to prior performance history, the weighting rules require ASCAP employees to make certain subjective judgments about music performances that cannot be verified. Generally, cue sheets are used to determine music performance information. However, the weighting

1 These rules are contained in the ASCAP Consent Decree, dated January 7, 1960, as set forth in ASCAP Exhibit No. 3, at pp. 586-597. The amended version of the rules in effect in 1987 was submitted to BMI and the Tribunal by ASCAP in a letter dated November 14, 1989.

rules require information beyond the cue sheets, such as whether a work was performed with dancers, or was the principal focus of audience attention. These subjective judgments can only be made on the basis of information not before the Tribunal. We are asked to accept ASCAP's representation that its employees were fair and accurate in applying their rules. Indeed, witness Boyle goes so far as to suggest that the validity of ASCAP's Distribution Survey, at least insofar as the computer database is concerned, should be accepted by the Tribunal as part of ASCAP's normal business practice.^{2/}

In addition, many of the abstract credits resulted solely from the listening to or viewing of tapes which were not provided to BMI. For example, in the WTBS exhibit ASCAP allotted itself two thirds of the abstract credits on Nighthtracks on the basis of a representation that ASCAP employees listened to a tape of Nighthtracks and wrote down what they heard.

ASCAP has also stated that some of the credits appearing in Exhibits No. 6 and 7 reflect advertising jingles and public service announcements that were also heard on tapes. No tapes were ever provided to document these performances.

2 Testimony of Peter Boyle, Tr. 781.

In summary, therefore, we have no way to verify the basis for the abstract credit calculations that appear in the four surveys for such works.

There are additional problems with the 53 station survey. It is derived from ASCAP's normal Distribution Survey of local television, aspects of which are kept confidential even from ASCAP's members.^{3/} For example, the depth of sampling of a station depends on the amount of license fees paid by that station to ASCAP. In fact, the depth of sampling is in direct proportion to the amount of license fees paid.^{4/} Neither the Tribunal nor BMI has been provided access to any of the details necessary to understand ASCAP's depth of sampling methodology for local television stations.

Second, ASCAP represents that it must receive approval from the Court and/or the Justice Department for changes to certain of the weighting rules. However, there is no evidence that the Court or the Justice Department examines the proposed rules from the standpoint of value to music users, as opposed to the standpoint of possible conflicting claims of ASCAP members. Indeed, it is my understanding that the only purpose of Court or Department

3 See ASCAP's Request for Confidential Treatment of BMI Exhibit No. X-1, dated December 29, 1989, at p. 3.

4 Testimony of Peter Boyle, Tr. 681-682.

of Justice "approval" is to ensure that ASCAP does not violate the applicable Consent Decree or orders.^{5/}

Finally, the 53 station survey also involves the use of station weight multipliers, strata multipliers and a feature multiplier. Because of their confidential nature, the statistical basis for these multipliers is known only in sketchy outline.

For all of these reasons, the results and methodology of the four ASCAP surveys have remained an unsolvable puzzle to BMI. In my view, therefore, they cannot be an adequate basis for allocation of the royalty fund, let alone the "sole" basis, as urged by ASCAP's witnesses. To the contrary, I believe that they should be rejected on the basis of lack of clarity. However, even if all of the missing links were available, there are still fundamental problems with reliance on ASCAP's subjective surveys from an economic viewpoint, as follows.

B. There Is No Economic Basis in the Music Marketplace to Justify the Use of ASCAP Royalty Distribution Weights for the Purpose of Measuring the Value of Music Used in Distant Signal Programming. Perhaps more significant than the problems just discussed is the lack of a nexus between the results of the ASCAP surveys, all of

5 Testimony of Peter Boyle, Tr. 697-698.

which incorporate ASCAP's "abstract performance credits," and the marketplace between copyright owners and music users. When music users pay for a license to perform music, they obtain in return the right to use all of the music in an organization's repertoire in any way they choose. The organization then distributes these earnings to copyright owners whose music is used in many different ways and in varying amounts by the music users.

How an organization chooses to distribute its license income among its members or affiliates is determined by its own internal policy. This policy is reflected in the distribution weights which the organization assigns to various types of music performances. Two important factors which shape these internal distribution policies are: (1) what each organization deems to be important equity considerations among its members or affiliates; and (2) each organization's strategy for attracting copyright owners. BMI does not contest the validity of ASCAP's Distribution Survey for distributions among ASCAP's members; however, it does not represent "objective" data in this proceeding to determine how music users would have valued such music in 1987.

The application of the abstract credit weights is a key factor in determining ASCAP's dollar payments to copyright owners for the performance of their music. Suppose

that the application of ASCAP's weights resulted in a payment of \$100 for eight minutes of background music. ASCAP's approach in this proceeding requires the Tribunal to accept that ASCAP's \$100 payment for eight minutes of background music is what this music is worth to music users.

There is no economic basis, however, to justify this connection between ASCAP's distribution payment to a member and the marketplace value of a particular performance of that member's music. The reason for this is that the eight minutes of background music is not licensed by itself. There is no way of knowing what the music user would have been willing to pay for the use of this piece of music, because music is not licensed on a performance basis. The marketplace can only objectively reveal what music users are willing to pay for access to an entire repertoire. There is no way of knowing whether \$100 is in fact more or less than what the music user would have been willing to pay.

In order for ASCAP's approach to be economically valid, the music marketplace would have to be one where music performances generally were licensed individually. If this were in fact the case, the following scenario could result. Suppose that a copyright owner observed that individual performances of his or her music were being

licensed by a performing rights organization at a rate which produced income in excess of what has being paid to the copyright owner by that organization. This copyright owner would have an incentive to take his or her music to another performing rights organization whose distributions more closely reflected the observed marketplace value of his or her music performances.

The economic effect of copyright owners' being able to compare their royalty distributions to the actual marketplace value of individual performances of their music would be to force performing rights organizations to keep their distributions per performance in line with their marketplace value. But this is not how the music marketplace works. A copyright owner cannot discover what an individual performance of his or her music is worth to a user in an arms-length transaction. Because blanket licenses are generally used to sell rights to performances, music users do not have to make any judgments about the value of particular works used in particular ways. There is no observable market evidence of what individual performances are worth. As a result, there is no economic mechanism which forces the value of a particular piece of music used in a particular way to be equal to the royalties actually paid for the performance.

In summary, ASCAP is asking the Tribunal to accept an economic analysis of what determines the value of a particular music performance that is inappropriate in this proceeding. Although ASCAP may claim that the eight minutes of background music in question is worth \$100 because that is what ASCAP has decided to distribute to the copyright owners, there is no way to prove this, nor is there any economic reason why this should necessarily be the case. Is \$100 too much? Too little? There is no objective way of knowing. Since the two organizations have different distribution weighting systems, BMI will not in general pay the same amount as ASCAP for the same eight minutes of background music. Is the Tribunal to accept ASCAP's weights or BMI's weights?

The economics of the music marketplace dictates that neither organization's distribution formula is relevant to the valuation of the music used in distant signal programming. It is the Tribunal's difficult task to reach a conclusion as to the relative value to cable system operators of the music of the two organizations performed in distant signal programming. I believe that the Tribunal should base its decision on the same kind of evidence that the Tribunal has accepted in the past, such as objective surveys of music use and analogous marketplace data. ASCAP's subjective surveys are not helpful to the Tribunal

in this regard. The results of all four ASCAP surveys reflect the effects of ASCAP's royalty distribution weighting system, the subjective ASCAP performance credits.

Finally, ASCAP witness Peter Boyle asserts, or comes very close to asserting, that the abstract credit values do not reflect the economic value of the music.^{6/} ASCAP claims to "follow the dollar" in making royalty distributions. Exhibit No. B-20R is a copy of a proposed order concerning the distribution of ASCAP's retroactive television fees in 1987. The footnote on page 5 of the exhibit reveals that in ASCAP's normal distribution process, as much as 26.4% of revenues received from local television stations are distributed on the basis of abstract credits generated by network television performances, and not on the basis of credits generated by local television performances.

The allocation of over one-fourth of ASCAP's local television income, including ASCAP's share of the funds at issue here, will therefore be distributed based on network performances, of which ASCAP has introduced no evidence into this proceeding. This refutes ASCAP's claim that the abstract credit approach "follows" the local television dollar in any meaningful way.

6 Testimony of Peter Boyle, Tr. 678-679.

II. Conclusion.

In conclusion, the Tribunal should not rely on ASCAP's surveys for two reasons: they are not verifiable, and there is no economic basis to justify their use in this proceeding. I believe that they should be given very little, if any, weight in this proceeding.

Before the
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Washington, D.C.

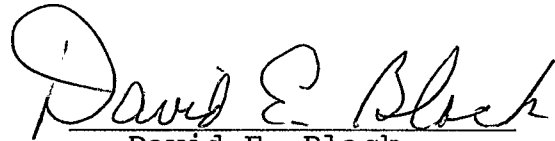
In the matter of:

1987 Cable Royalty
Distribution Proceeding

Docket No. 89-2-87CD
Phase II

Affidavit

I, David E. Black, declare under penalty of perjury
that the foregoing testimony is true and correct. Exe-
cuted on January 5, 1990.


David E. Black



Morton Gould
President

August 13, 1987

TO ALL MEMBERS OF THE SOCIETY:

On behalf of the Society's Board of Directors, I am pleased to announce a special distribution of additional local television interim license fees recently paid for the period April 1, 1985 through March 31, 1987.

The Society proposes to make the special distribution in September. We are seeking a court order approving the proposed distribution. Copies of Judge Conner's Order dated August 7, 1987 directing that a hearing be held, and my affidavit describing the manner in which we propose to make the special distribution, are part of this booklet.

The hearing on the Society's motion for an order approving the proposed special distribution will be held on September 10, 1987 at 9:00 a.m. in Room 618 of the United States Courthouse, Foley Square, New York, N.Y. Any member may appear at this hearing and make application to be heard on the ground that the proposed special distribution is not consistent with the antitrust purposes of the lawsuit entitled *United States v. ASCAP*, and the Amended Final Judgment and the Order of January 7, 1960, as amended, entered in that lawsuit.

Sincerely yours,

Morton Gould

MG:rs
att.

United States District Court
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,
Plaintiff,

—against—

AMERICAN SOCIETY OF COMPOSERS,
AUTHORS AND PUBLISHERS, et al.,
Defendants.

Civ. 13-95 (WCC)

ORDER TO SHOW CAUSE

Upon the motion of the defendant American Society of Composers, Authors and Publishers ("the Society"), on all proceedings heretofore had in this action, and upon the affidavit of Morton Gould, President of the Society, sworn to on August 4, 1987, it is hereby

ORDERED that the parties to this action show cause before this Court at a hearing to be held on the 10th day of September, 1987, at the United States Courthouse, Foley Square, New York, New York, in Room 618, at 9:00 a.m., or as soon thereafter as counsel can be heard, why this Court should enter an Order, in the form annexed as *Exhibit A* to this Order, governing the manner in which a special distribution to the Society's members should be made; and it is further

ORDERED that the Society mail to each of its members, to the Department of Justice and to Messrs. Seth M. Hufstедler and Leo Kaplan, the Special Distribution advisors, on or before August 17, 1987, a copy of (1) a letter in the form attached to the affidavit of Morton Gould; (2) this order to show cause; and (3) the affidavit of Morton Gould sworn to August 4, 1987; and it is further

ORDERED that any member of the Society may appear at such hearing and make application to be heard on the ground that the proposed special distribution is not consistent with the antitrust purposes of this suit, the Amended Final Judgment, and the Order of January 7, 1960, as amended, herein.

WILLIAM C. CONNER

U.S.D.J.

Dated: August 7, 1987
New York, New York

EXHIBIT A

United States District Court
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,
Plaintiff,

—against—

AMERICAN SOCIETY OF COMPOSERS,
AUTHORS AND PUBLISHERS, et al.,
Defendants.

Civ. 13-95 (WCC)

ORDER

Upon the motion of the defendant American Society of Composers, Authors and Publishers ("the Society"), on all proceedings heretofore had in this action, and upon the affidavit of Morton Gould, President of the Society, sworn to on August 4, 1987, and the Court having held a hearing on the Society's motion on September 10, 1987, it is hereby

ORDERED that the Society shall distribute to its members sums paid by local television stations as additional interim license fees for the period April 1, 1985 through March 31, 1987, in the manner set forth in the annexed "Plan For Special Distribution of Local Television Interim License Fees."

U.S.D.J.

Dated: _____, 1987
New York, New York

4.

PLAN FOR SPECIAL DISTRIBUTION OF LOCAL TELEVISION INTERIM LICENSE FEES

The Society shall distribute the sum of \$40,000,000,* representing additional interim license fees paid by local television stations pursuant to Magistrate Dolinger's order dated February 17, 1987 in *United States v. ASCAP, Application of Buffalo Broadcasting Co., Inc., et al.* The additional fees, for the period April 1, 1985 through March 31, 1987, total \$40,000,000 including interest and after deducting the costs associated with the special distribution. The special distribution shall be comprised of two funds. The amount of each fund and the method of distribution shall be as follows:

Fund A

1. Overhead Adjustment: Assuming \$20,000,000 shall be available for distribution for each of the periods April 1, 1985 through March 31, 1986 and April 1, 1986 through March 31, 1987, the Society shall apply the applicable percentages of overhead (i.e., costs of doing business as a percentage of distributable domestic revenue) for each year to derive the following amounts available for distribution for each period:

April 1, 1985 through March 31, 1986	\$ 5,100,000
April 1, 1986 through March 31, 1987	5,300,000
TOTAL OVERHEAD ADJUSTMENT	\$10,400,000

2. Television Credits Allocation Adjustment: Each year the Society sets goal credits for each surveyed medium, based on a forecast of revenues from each such medium. For local television, the forecast of revenues was too high for one survey year—because of the expectation that license fees that had been reduced as a result of the trial court decision in the *Buffalo* case would be promptly restored to a higher level when that judgment was reversed. Specifically, for the 1985 survey year the forecast of local television revenues was too high and therefore the percentage of those revenues of anticipated revenues from all licensees was too high by 4.57%. As a result, performance credits for local and network television** combined were too high by the same percentage. That percentage (4.57%) applied to the amount distributed in the period April 1, 1985 through March 31, 1986, \$155,100,000, shall be the amount attributable to the over-valuation of local and network television performances. That amount is \$7,100,000.

3. The Overhead Adjustment plus the Television Credit Allocation Adjustment shall comprise the Fund A amount, \$17,500,000, of which \$5,100,000 plus \$7,100,000, or \$12,200,000, is for the period April 1, 1985 through March 31, 1986, and \$5,300,000 is for the period April 1, 1986 through March 31, 1987. These amounts shall be

*As of August 3, 1987, the Society had collected \$37,662,864. It is anticipated that about \$40 million will be received by the time of the special distribution, now forecast for early October 1987. Therefore, the \$40 million figure has been used to make preliminary calculations. The actual distribution will be the sum then appropriate.

**Network credits are affected by local station revenues. See footnote on [following] page.

distributed on a basis which is *pro rata* to the amounts actually received by members in the respective periods. From these sums, amounts shall be set aside for payment to foreign societies in the same proportion as payments were made to such societies during the applicable periods.

Fund B

1. The Fund B amount shall be \$22,500,000—the amount available for the special distribution, \$40,000,000, less the Fund A amount, \$17,500,000.

2. Assuming \$20,000,000 shall be available for distribution for each of the periods April 1, 1985 through March 31, 1986 and April 1, 1986 through March 31, 1987, the Society shall use the Fund A amounts attributable to each such period to determine the Fund B amounts for the same periods.

Fund B amount for 4/1/85–3/31/86: \$7,800,000, computed as follows:

$$\begin{array}{r} \text{Fund A amounts for 4/1/85 through 3/31/86:} \\ \$5,100,000 + \$7,100,000 = \$12,200,000 \\ \$20,000,000 - \$12,200,000 = \qquad \qquad \qquad \$ 7,800,000 \end{array}$$

Fund B amount for 4/1/86–3/31/87: \$14,700,000, computed as follows:

$$\begin{array}{r} \text{Fund A amount for 4/1/86–3/31/87} = \$5,300,000 \\ \$20,000,000 - \$5,300,000 = \qquad \qquad \qquad 14,700,000 \end{array}$$

TOTAL Fund B AMOUNT = \$22,500,000

3. The Fund B amount shall be distributed to all members with surveyed commercial television performances (in both the local and network television* media). This amount shall be allocated as follows: 73.6% for local television (\$16,500,000) and 26.4% for network television (\$6,000,000). This allocation is consistent with the allocations employed in the Society's regular distributions. Members will receive distributions from Fund B on a basis which is *pro rata* to the local and network television performance credits that served as the bases for the distributions they received in the respective periods set forth above.

4. As with the distribution of the sums comprising Fund A, an amount shall be set aside from Fund B for payment to foreign societies in the same manner as for writer and publisher members, as set forth in the preceding paragraph.

*Network television performances are taken into account because, as part of its regular distribution practices, the Society apportions 34.05% of total collections from television stations affiliated with the three major television networks to network performances. This takes into consideration the substantial amount of revenue received by network affiliates as a result of local commercial announcements adjacent to and reasonably attributable to network programs (see Section II(a) of the January 7, 1960 Order, as amended, in *United States v. ASCAP*). The 34.05% relates only to affiliated station revenues. The percentage of local station revenues allocated to the networks is 26.4% when revenues from independent (non-affiliated) stations are considered.

United States District Court
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,
Plaintiff.

—against—

AMERICAN SOCIETY OF COMPOSERS,
AUTHORS AND PUBLISHERS, et al.,
Defendants.

Civ. 13-95 (WCC)

AFFIDAVIT

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

MORTON GOULD, being sworn, states:

1. I am President of the American Society of Composers, Authors and Publishers ("the Society"), and make this affidavit in support of the Society's motion for an order to show cause, returnable September 10, 1987, concerning a proposed special distribution of additional interim license fees recently paid to ASCAP by certain local television stations.

BACKGROUND

2. On February 17, 1987, United States Magistrate Michael H. Dolinger entered an interim fee order in *United States v. ASCAP, Application of Buffalo Broadcasting Co., Inc., et al.*, the pending proceeding brought by most local television stations, other than those owned by the ABC, CBS and NBC television networks, for determination of reasonable license fees under Section IX of the Amended Final Judgment herein. That order required those television stations to pay by July 6, 1987 additional interim license fees for the period April 1, 1985 through March 31, 1987.

3. Pursuant to Magistrate Dolinger's Interim Fee Order, the stations have now paid ASCAP about \$37 million. We expect that sum to rise by September, 1987 to about \$40 million (including interest and excluding the cost of the special distribution) when the proposed special distribution would be made and are using that sum for present purposes. The actual amount to be distributed will be the appropriate sum at the time the distribution is made.

4. The Society seeks an order directing that these additional license fees be distributed to the Society's members in a special distribution, rather than as part of the Society's regular 1987 distributions. I set forth below the basis on which the Society's Board of Directors proposes that the special distribution be made.

THE PROPOSED SPECIAL DISTRIBUTION

5. The special distribution will be paid to current members (including former members whose works were part of the Society's repertory in the years 1985-1987 and who were entitled to receive distributions from the Society) and to affiliated foreign societies.

6. If the additional interim payments had been paid over the entire period rather than recently, all members receiving distributions during that period would have benefited, not just those with surveyed commercial television performances. This is so because there would have been more money available for distribution and all performances would have earned more money. Put another way, if these fees had been received in the periods for which they were paid, commercial television would have borne more of the Society's overhead costs and other surveyed media would have borne less. This "overhead adjustment" amounts to \$10.4 million.

7. In addition, it is appropriate to make an adjustment with respect to surveyed commercial television performances which served as the bases of distributions made in the period April 1, 1985 through March 31, 1986. An adjustment is appropriate because ASCAP's forecast of license revenues from local television for this period was based on ASCAP's revenue budget. That forecast, which affected the allocation of credits for all surveyed media, was based on the assumption that promptly after Judge Gagliardi's judgment in *Buffalo Broadcasting v. ASCAP* was reversed, the local television stations would be required to pay higher interim license fees. However, they were not required to pay higher fees (until now). Therefore, members were overpaid for surveyed commercial television performances in that period. This adjustment amounts to \$7.1 million.

8. The Board of Directors believes that the monies available for the special distribution should be divided into two separate funds, one for the adjustments I have just described (Fund A), and the other for the remaining distributable sum now estimated at \$22.5 million (Fund B). The distribution would be made in the manner set forth in the "Plan For Special Distribution of Local Television Interim License Fees" annexed hereto as *Exhibit A*.[*]

9. Summarized briefly, the proposal is that all members will receive from Fund A additional royalties in amounts which are *pro rata* to their distributions in the distribution periods involved, Second Quarter 1985 through First Quarter 1986, and Second Quarter 1986 through First Quarter 1987. Fund A shall total \$17.5 million (\$10.4 million plus \$7.1 million).

[*This Exhibit is annexed to the proposed order, which is annexed to the Order to Show Cause.]

10. Members who received distributions based on surveyed commercial television performances (i.e., performances by local television stations and the ABC, CBS and NBC television networks) will also receive additional royalties from Fund B, based on performance credits which served as the bases for distributions for the same periods set forth in the preceding paragraph. As stated above, Fund B shall total \$22.5 million.

11. In calculating the actual amounts to be paid from each of the funds described above, the Society will first add interest earned and deduct the anticipated costs of the special distribution, now estimated to be \$50,000. The Society will also set aside from each of the funds amounts totaling approximately \$3.7 million for distribution to foreign societies.

12. On July 24, 1987, the Society's Board of Directors authorized a special distribution on the terms set forth in the annexed "Plan For Special Distribution of Local Television Interim License Fees," subject to entry of an appropriate order by this Court. ASCAP believes the Plan provides for a fair and equitable method of distributing the additional interim license fees. Notice of the proposed special distribution will be given to the Government, the Special Distribution Advisors and to all members of the Society. A copy of the draft of my proposed letter to the members is annexed as *Exhibit B*.[*]

RELIEF SOUGHT

13. For the reasons set forth above, the Society respectfully requests that the Court order distribution of the local television stations' interim fees to the members on the basis set forth in the annexed "Plan For Special Distribution of Local Television Interim License Fees."

MORTON GOULD
MORTON GOULD

Sworn to before me this
4th day of August, 1987.

SUSAN HAUGH
NOTARY PUBLIC
SUSAN HAUGH
Notary Public, State of New York
No. 41-4722612
Qualified in Queens County
Certificate Filed in New York County
Commission Expires September 30, 1988

[*This Exhibit is the form of letter on the cover of this booklet.]

REBUTTAL TESTIMONY OF MARVIN L. BERENSON

Mr. Chairman, Commissioner Aguero, my name is Marvin L. Berenson. I am Vice President, Licensing, of Broadcast Music, Inc. ("BMI"). My background and qualifications were included in my direct testimony in this proceeding. The purpose of my rebuttal testimony is to demonstrate the fallacy of ASCAP witness Messinger's testimony concerning the respective marketplace values of the repertoires of BMI and ASCAP.

In my testimony I will examine the comparative license fees paid for the two repertoires in 1987 by various broadcast and cable licensees. I will also offer additional evidence of awards given to BMI affiliates throughout the years to rebut ASCAP's claim to qualitative superiority in the music industry.

I. The Marketplace Has Rejected ASCAP's Claim of a Two-to-One Superiority.

An examination of the comparative rates paid by various broadcast licensees for access to the BMI and ASCAP repertoires in 1987 refutes Ms. Messinger's testimony that the broadcasting marketplace values ASCAP music twice as much as BMI music. The comparisons that follow are, I believe, strong evidence that cable system operators too

would have rejected the claims made by ASCAP in this proceeding for in excess of two thirds of the music portion of the cable royalty fund.

A. Radio Station Licensees. BMI Exhibit No. B-21R demonstrates that in 1987, radio broadcast stations paid to BMI a rate of 1.39% of their net revenue, as compared with 1.56% for ASCAP. This amounts to a ratio of 47% for BMI and 53% for ASCAP.

B. Network Television Licenses. BMI Exhibit No. B-22R demonstrates that the networks paid BMI 46% of their expenditures for music, as compared with 54% for ASCAP. Moreover, BMI's license agreement with ABC-TV, recently negotiated, provides that BMI's payment will equal ASCAP's payment starting in 1991.

C. Home Box Office. BMI Exhibit No. B-23R demonstrates that for 1987 BMI's negotiated fee for HBO's cable movie service was 12¢ per subscriber, as compared with ASCAP's fee, reflected in ASCAP's "Rate Court" decision last November, of 15¢ per subscriber. This ratio amounts to 44.4% for BMI as compared with 55.6% for ASCAP. A copy of the ASCAP Rate Court's decision in the Showtime v. ASCAP litigation (redacted by Court order), dated November 3, 1989, is included in the exhibit.

The ASCAP Rate Court, of course, has no jurisdiction over BMI, and cannot set BMI's rates with any licensee. BMI did not participate in that proceeding, or offer any evidence as to the comparative value of its repertoire. The Court found that licensees tended to pay BMI and ASCAP equal amounts of fees during the period from 1984 through 1988. For example, the Court stated that "it is reasonable to infer that the ratios reflecting a nearly one-to-one relationship between ASCAP and BMI are better indicators of the equivalent bargaining leverage between licensor and licensee . . . " than ASCAP's claim of a two-to-one advantage. Opinion at p. 46.

In settling on the higher 15¢ per subscriber figure for ASCAP, the Rate Court noted that ASCAP's repertoire had 3 million works, as compared with 1 million works in the BMI repertoire. I would like to point out that the actual size of the BMI repertoire in 1987 was in excess of 1.5 million works. In addition, a substantial portion of the works in the ASCAP repertoire are works of foreign origin which are unpublished in the United States, and are less likely to appear on television and cable in the United States.

D. Country Music Television. BMI Exhibit No. B-24R demonstrates that Country Music Television, a basic cable

service, paid BMI 1% of net revenues in 1987. This compares with the interim fee of 0.7% of net revenues set by the Rate Court for ASCAP commencing in 1989. Thus, BMI would have received 59% and ASCAP 41% of the royalties paid by Country Music Television for 1987, comparing the negotiated BMI rate with the ASCAP rate under the Court's decision. Included in the exhibit is a copy of the Rate Court's interim fee decision for ASCAP, dated November 3, 1989 (redacted by Court order), establishing the Country Music Television rate among others, for ASCAP for 1989.

E. Nashville Network. BMI Exhibit No. B-25R demonstrates that BMI has negotiated for 55% of the total music royalties paid by Nashville Network, another basic cable service, for 1987. This results in a ratio of 55% for BMI and 45% for ASCAP.

F. BMI's Broadcast Ownership. ASCAP has contended that BMI's founding was actually motivated by the desire of its broadcaster shareholders to pay less for music. ASCAP's contention is spurious and has never found acceptance. The increasing license fees paid to BMI by music users in all categories, and the trend towards convergence over the years, flatly refute this. On the other hand, the experiences of composers facing ASCAP's restrictive membership practices, the reason for BMI's

founding 50 years ago, are a matter of historical record.

BMI Exhibit No. B-26R is a copy of an internal memorandum of the Department of Justice, dated November 22, 1966, dismissing ASCAP's claims of antitrust violations stemming from BMI's ownership by broadcasters.

Finally, in my direct testimony, I presented a comparison of the total license fees of BMI and ASCAP in 1987 and 1988. The BMI figures were based on averages of two fiscal years. In response to questions as to the methodology, I here provide BMI Exhibit No. B-27R which shows the total license fees of the two organizations in 1987 and 1988 on an actual calendar year basis. In addition, certain adjustments for retroactive fees have been made to both the BMI and ASCAP figures, as described in the exhibit.

II. The Quality of BMI's Repertoire Is Second to None.

Ms. Messinger stated that if any incremental increase should be awarded to reflect the quality of the repertoires, then ASCAP should be the recipient. I disagree. BMI Exhibit No. B-28R shows the Oscars, Grammys and Pulitzer Prizes that have been awarded to BMI composers over the years. In addition, Exhibit No. B-29R

shows further information about the amount of BMI music on the top syndicated television programs in 1987.

We at BMI believe the music in our repertoire to be second to none. This includes the music on the distant signals available to cable system operators in 1987.

III. Conclusion.

Contrary to Ms. Messinger's testimony, the Tribunal's role in this proceeding should be to approximate what free market royalty allocation would have resulted had cable system operators freely negotiated for music use rights in 1987. I believe that evidence of what other broadcast and cable licensees have paid to BMI and ASCAP is the most probative on the issue.

In all cases, the respective fees closely approximate a one-to-one ratio, not the two-to-one ratio claimed by ASCAP in this proceeding. I believe that this demonstrates the inaccuracy of ASCAP's claim that it would, by negotiation, have obtained a two-to-one superiority from cable system operators in 1987. Indeed, we believe that in marketplace negotiation with cable system operators in 1987, BMI and ASCAP would have negotiated comparable rates.

Before the
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Washington, D.C.

In the matter of:)
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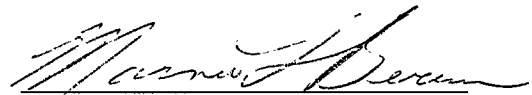
1987 Cable Royalty)
Distribution Proceeding)
_____)

Docket No. 89-2-87CD
Phase II

Affidavit

I, Marvin L. Berenson, declare under penalty of per-
jury that the foregoing testimony is true and correct.

Executed on January 5, 1990.


Marvin L. Berenson

Local Radio Blanket License Rates -
Percentage of Net Revenues

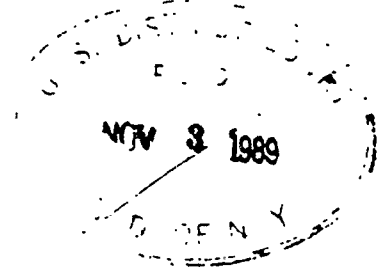
	<u>BMI</u>	<u>ASCAP</u>
	1.39%	1.56%
	<hr/>	<hr/>
Ratio:	47%	53%

1987 Network Television Rates (CBS, ABC and NBC)

	<u>BMI</u>	<u>ASCAP</u>
Ratio:	46%	54%

1987 Home Box Office Rates (per subscriber)

	<u>BMI</u>	<u>ASCAP</u>
	12¢	15¢
Ratio:	<u> </u>	<u> </u>
	44.4%	55.6%



UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X

UNITED STATES OF AMERICA,	:	REDACTED
	:	MEMORANDUM AND
Plaintiff,	:	<u>ORDER</u>
	:	
-against-	:	Civ. 13-95 (WCC)
	:	
AMERICAN SOCIETY OF COMPOSERS,	:	
AUTHORS AND PUBLISHERS,	:	
	:	
Defendants.	:	

-----X

IN THE MATTER OF THE APPLICATION	:
OF SHOWTIME/THE MOVIE CHANNEL, INC.,	:
	:
Applicant.	:
	:
For A License for Its Pay	:
Television Services.	:

-----X

MICHAEL H. DOLINGER
UNITED STATES MAGISTRATE:

Showtime/The Movie Channel, Inc. ("SMC") has applied to this Court pursuant to Article IX(A) of the Amended Consent Decree for an order setting a reasonable fee for a "blanket" license from the American Society of Composers, Authors and Publishers ("ASCAP") for the period from April 4, 1984 through December 31, 1988. SMC also seeks an order declaring that it is entitled to a so-called "per program" license from ASCAP under Article VII(B) of the Decree.

For the reasons that follow, the fee for the blanket license for the period in question is set at \$0.15 per subscriber. With respect to the per-program license question, since ASCAP has represented that it is willing to negotiate a fee for such a license, there is no current controversy that requires resolution of the meaning of the Decree. Accordingly, the parties are to attempt for a period of twenty-one (21) days to resolve by negotiation the amount of any such fee, at which time SMC may return to the Court under Article IX(A).

A. Background

As noted in prior decisions in this proceeding, the jurisdiction of this so-called "rate" court is an artifact of a consent decree negotiated between the United States Department of Justice and ASCAP to settle an antitrust lawsuit commenced by the Government to challenge various practices of ASCAP in the licensing of the copyrighted music of ASCAP's members. As amended in 1950, the decree requires ASCAP to make available on request a license for the public performance of its music. (Consent Decree, Article V.)¹ In addition to the traditional blanket license -- which makes

¹ The Consent Decree is reproduced in United States v. ASCAP, 1950-1951 Trade Cases (CCH) ¶ 62,595 (S.D.N.Y. March 14, 1950).

the entire ASCAP repertory available for unlimited use during the license period, in exchange for a specified payment -- the decree requires ASCAP to offer to "radio and television broadcasters" a so-called "per program license," which exacts a fee for each designated program. (Article VII(B).)

The Consent Decree further provides that the parties are to attempt, in the first instance, to negotiate a mutually acceptable fee for the license and, failing that, either party may, after sixty days, apply to this Court to set a "reasonable fee." (Article IX(A).) The Decree does not attempt to define the term "reasonable fee" and thus apparently leaves to the Court broad discretion to fashion an appropriate methodology for deriving such a rate.

Article IX(B) of the Decree also permits the Court to set an interim fee upon application by either party. That fee is to govern during the period when the parties either negotiate a final fee or litigate its terms before the rate court. The interim fee, however, is subject to retroactive modification to conform to the final fee that is either agreed to or imposed by court order.

In this case, SMC served on ASCAP on April 4, 1984 a request for a license for both the preceding period from April 4, 1981 to April 3, 1984 and for the period from April 4, 1984 forward to

December 31, 1986. When negotiations failed SMC filed an application with the Court seeking a determination of fees for the same time period. By Memorandum and Order dated July 8, 1986, the Court dismissed SMC's application insofar as it sought relief for the three-year period prior to April 4, 1984 since the Consent Decree did not authorize such retroactive fee setting. Subsequently the parties agreed to modify SMC's fee application to encompass an additional two-year period, ending December 31, 1988. (See Joint Pre-trial Statement ("JPS") at ¶ 3, n.2.)

During the pendency of this proceeding, ASCAP applied for the award of interim fees. By Memorandum and Order dated October 15, 1984, the Court ordered that SMC commence paying provisional fees in the amount of \$90,000.00 per month. Thereafter, based upon a fuller written record, the Court ordered SMC to pay interim fees for a blanket license in the same amount. (See Memorandum and Order dated January 14, 1985.) That interim fee has been in place since January 14, 1985.

Finally, since the parties' episodic efforts at settlement proved unavailing, the Court conducted a seven-day trial in January 1988. Post-trial briefing followed in March 1988.

B. The Parties and their Relationship

ASCAP is an unincorporated membership association consisting of approximately 40,000 composers and music publishers, who rely upon it to license the performing rights in their copyrighted musical compositions. (JPS at ¶ 2.)² ASCAP serves as both the licensing agent and the collector and distributor of royalties for licensed performances. Its repertory includes more than three million compositions. See Buffalo Broadcasting Co. v. ASCAP, 744 F.2d 917, 920 (2d Cir. 1984), cert. denied, 469 U.S. 1211 (1985).³

SMC is in the business of acquiring, producing, marketing and transmitting programs through pay-cable television channels. It operates principally two pay cable services, known as Showtime and

² Under the terms of the Consent Decree, ASCAP can serve only as a non-exclusive agent for its members, thus reserving to the members the option of directly licensing their compositions if they so choose. (See Consent Decree Article IV(B).) As a practical matter, users of music in the television industry have generally dealt with ASCAP rather than seeking some form of direct licensing.

³ For historical background concerning the formation of ASCAP and its role in the protection of composers' property interest in their music, see Sobel, "The Music Business and the Sherman Act: An Analysis of the 'Economic Realities' of Blanket Licensing," 3 Loyola Ent. L.J.1, 2-3 (1983). See also Finkelstein, "The Composer and the Public Interest -- Regulation of Performing Rights Societies," 19 Law & Contemp. Prob. 275 (1954).

The Movie Channel.⁴ (JPS at ¶ 1.) For the most part, the programs of SMC consist of made-for-theatre movies; a smaller portion consist of general entertainment programs. (JPS at ¶¶ 11-12.) The programs acquired or produced by SMC are transmitted to viewers through cable television system operators, who charge willing subscribers a monthly fee for access to each of the SMC services, and pass along a portion of that fee to SMC. (JPS at ¶¶ 1, 7.)

SMC and its predecessor entities have a very limited history of fee negotiations and agreements with ASCAP. In 1979 both Showtime and The Star Channel -- the predecessors of SMC⁵ -- entered into licensing agreements with ASCAP for the period from January 1, 1977 through December 31, 1979. (See Memorandum and Order Dated January 14, 1985, at 5; JPS at ¶¶ 26, 27.) Under the Showtime agreement, no fee was payable for 1977, and for the next two years Showtime was to pay \$12,500.00 and \$52,500.00 respectively. (Id.) The agreement for Star Channel provided for no payment for 1977, and payments of \$6,000.00 and \$9,000.00 for

⁴ Since 1986 SMC has also operated a "pay per view" service named Viewer's Choice. (JPS at ¶ 2.)

⁵ SMC was formed in 1983 as a joint venture of Viacom, Inc. and Warner Communications, Inc. Those companies had previously separately operated services known, respectively, as Showtime and The Movie Channel (originally called the Star Channel). Showtime began operation as a subsidiary of Viacom in July 1976 and The Movie Channel, in its prior incarnation as the Star Channel, commenced operations as a subsidiary of Warner, in February 1973. (See Memorandum and Order dated January 14, 1985, at 4.)

1978 and 1979. (Id.) Both agreements contained an identical provision specifying that they were

being entered into on an experimental and non-prejudicial basis, shall apply for the term of this agreement only, and shall not be binding upon or prejudicial to any position taken by either of the parties for any period subsequent to the termination of the agreement.

(Joint Exhs. 2 & 3 at ¶ 1(c).)

For the period from 1980 to April 1984, neither SMC nor its predecessors held any ASCAP license. See David v. Showtime/The Movie Channel, 697 F. Supp. 752, 754 (S.D.N.Y. 1988); Deposition of Benson Begun at 9-15; Deposition of Michael Gerber at 23-24.⁶ This state of affairs apparently resulted from an initial inability to reach agreement and then an abortive effort by ASCAP to seek royalty payments directly from the cable system operators rather than from the pay cable programming services. See Gerber Dep. at 32-38; David v. Showtime/The Movie Channel, supra, 697 F. Supp. at 754. When this attempt was abandoned and the parties were again unable to reach agreement, SMC formally requested a license from ASCAP on April 4, 1984.

⁶ The deposition of Mr. Begun was received in evidence as ASCAP Exh. 21. The deposition of Mr. Gerber was received as SMC Exh. U.

C. The Positions of the Parties

In valuing the blanket license under which SMC now operates, the parties have offered strikingly different approaches. ASCAP urges that a "reasonable" fee is best judged by a comparison with fees agreed to either between the same parties or between comparably situated parties if the agreements were reached in "arms length" negotiations. Since the parties in this proceeding have no meaningful record of prior dealings -- the early "experimental" rates having concededly reflected the nascent status of Showtime and the Star Channel in the late 1970's -- ASCAP would have the Court look to its course of dealings with SMC's principal current competitor in the pay cable television market, Home Box Office, Inc. ("HBO"). Citing its agreements with HBO for the 1980-to-1982 period and its subsequent agreement with HBO for 1983 to 1985, ASCAP argues that those deals involved annual payments that ultimately approximated \$0.25 per HBO subscriber. ASCAP also invokes the fact that on December 17, 1985 HBO offered, in effect, to extend its prior agreement on the basis of an annual payment representing \$0.24.1 per subscriber. According to ASCAP, the willingness of HBO to accept these fee levels in "arms length" negotiations should govern here since HBO is comparable to SMC in its market position and its use of music on its programming.

Indeed, HBO not only offers programming very similar to that of SMC, but is its principal competitor.

Based on these comparisons, ASCAP seeks a fee of \$0.25 per subscriber. In further support of this position ASCAP cites its license agreement with the Disney Channel for the period from April 18, 1983 through the end of 1985. Although this agreement, like the HBO contracts, called for lump sum payments, ASCAP calculates that, based on Disney's subscriber levels, those fees in effect amounted to payments of between \$0.21 and \$0.29 per subscriber.⁷

SMC frontally attacks the proposed reliance on any prior ASCAP agreements principally because, in its view, ASCAP is a classical monopolist and is thus able to extract prices well above the levels that would be set in a freely competitive market. In place of the HBO and Disney analogies, SMC offers a mode of analysis that attempts to assign an economic value to the music used by SMC in its programming. To do this SMC looks to the cost of acquiring other creative elements of such programming, specifically script-writing and directorial services. Based on this approach, SMC suggests that a generous valuation of the benefits that it receives under the ASCAP blanket license would permit an award of no more than \$0.08 per subscriber.

⁷ The variation between \$0.21 and \$0.29 reflects two different measures of subscribers, year-end and total average subscribers.

With respect to the per-program license question, ASCAP argues that because SMC is a cable program supplier, it is not entitled to a per-program license under the terms of Article VII(B) of the Consent Decree. It also argues that SMC should not be permitted at this stage to press for such a license because it has never manifested any interest in obtaining one. Predictably, SMC disagrees with both of these contentions and seeks an order directing ASCAP to make such a license available.

ANALYSIS

I. The Blanket License Question

A. General Standards

The Consent Decree provides very limited guidance as to the criteria by which royalty fees are to be established. Indeed, it refers only to the setting of a "reasonable fee," without further defining the term.

As a general matter consent decrees are to be read in accordance with their "plain meaning" or "explicit language." See, e.g., United States v. Atlantic Refining Co., 360 U.S. 19, 22-23 (1959); Berger v. Heckler, 771 F.2d 1556, 1568 (2d Cir. 1985);

Artvale, Inc. v. Rugby Fabrics Corp., 303 F.2d 283, 284 (2d Cir. 1962)(per curiam); cf. Schurr v. Austin Galleries of Illinois, Inc., 719 F.2d 571, 577 (2d Cir. 1983)(Van Graafeiland, J., concurring). This emphasis on interpreting the decree within its "four corners" is based on the notion that the decree "represents a compromise between parties who have waived their right to litigation and, in the interest of avoiding the risk and expense of suit, have 'give[n] up something they might have won had they proceeded with the litigation. . . ." Berger v. Heckler, supra, 771 F.2d at 1568 (quoting United States v. Armour & Co., 402 U.S. 673, 681 (1971)). Accordingly, we are cautioned, "the scope of the consent decree must be discerned within its four corners, and not by reference to what might satisfy the purposes of one of the parties to it." Firefighters Local Union No. 1784 v. Stotts, 467 U.S. 561, 574 (1984); SEC v. Levine, Dkt. Nos. 88-6294, 6296, 6298, 6300, 6302, 6304, slip op. 4887, 4916-17 (2d Cir. Aug. 2, 1989); Berger v. Heckler, supra, 771 F.2d at 1568.

Nonetheless, as is the case with contracts, if the terms of a decree are not self-explanatory, the court may look to contextual indicia of meaning. See, e.g., United States v. ITT Continental Baking Co., 420 U.S. 223, 238 (1975); SEC v. Levine, supra, slip op. at 4917 (citing Schurr v. Austin Galleries of Illinois, Inc., supra, 719 F.2d at 575). See also United States v. American Cyanamid Co., 719 F.2d 558, 564 (2d Cir. 1983). That is surely

necessary here, since the key term "reasonable fee" is not defined and does not have an explicitly accepted meaning.

In prior interim fee decisions in this and related proceedings, this Court has indicated that the appropriate analysis ordinarily seeks to define a rate or range of rates that approximates the rates that would be set in a competitive market. See, e.g., In re Buffalo Broadcasting Co., Memorandum & Order at 9-11 (S.D.N.Y. Feb. 17, 1987). This conclusion is based in large measure on the perception that the rate-setting mechanism defined by the decree was designed to address potential pricing problems in a market that is concededly not freely competitive. See, e.g., U.S. v. ASCAP, 586 F. Supp. 727, 728, 730 (S.D.N.Y. 1984); Deposition of Dr. Paul Fagan at 35⁸; Tr. 114-15; Sobel, supra, 3 Loyola Ent. L.J. at 33-34. See also Cirace, "CBS v. ASCAP: An Economic Analysis of a Political Problem", 47 Ford. L. Rev. 277, 303-04 (1978); Finkelstein, supra, 19 Law & Contemp. Probs. at 288. Indeed, the courts have repeatedly acknowledged that the rate court not only functions as an alternative source of pricing for public performance licenses in the event that the would-be licensee and ASCAP are unable to reach agreement in direct negotiations, see, e.g., K-91, Inc. v. Gershwin Pub. Corp., 372 F.2d 1, 4 (9th Cir. 1967), cert. denied, 389 U.S. 1045 (1968), but also serves to minimize the likelihood that ASCAP's evident market leverage may

⁸ The Fagan Deposition was received as SMC Exh. W.

be exerted to obtain unacceptably inflated price levels for its licenses. See, e.g., Broadcast Music, Inc. v. Columbia Broadcasting System, Inc., 441 U.S. 1, 24 (1979); Buffalo Broadcasting Co. v. ASCAP, 744 F.2d 917, 923 (2d Cir. 1984), cert. denied, 469 U.S. 1211 (1985).

Notwithstanding the primacy of these concerns, it is appropriate to note certain caveats with respect to the specific application of this general policy. These indicate that restraining ASCAP's pricing is not necessarily the only relevant consideration and that even that goal does not dictate a search for the perfectly competitive market price.

As a general matter a consent decree may fairly be interpreted with an eye to the policies of the statute under which the Court approves the decree. See, e.g., United States v. American Cyanamid, supra, 719 F.2d at 564. Nonetheless, as previously noted, the Supreme Court has cautioned against the assumption that a consent decree has, as its central purpose, the alleviation of a problem that was only alleged, and not proven, by the plaintiff in the underlying case. See, e.g., Firefighters Local Union No. 1784 v. Stotts, supra, 467 U.S. at 574; United States v. Armour & Co., supra, 402 U.S. at 681; SEC v. Levine, supra, slip op. at 4916-17; Berger v. Heckler, supra, 771 F.2d at 1568. Since the Justice Department chose to settle its antitrust suit, the

Decree in this case should not be viewed as simply an endorsement of its theory of monopolistic power and conduct by ASCAP.

The very generality of the term "reasonable rate" suggests that in appropriate circumstances the rate court has some discretion to look to considerations beyond simply the policy of encouraging pricing restraint for ASCAP music. The nature of that discretion is at least suggested by the fact that the apparent antecedent for the rate court provision of the Consent Decree was a line of cases in which the courts have ordered antitrust violators to license their patents to all applicants for a "reasonable" royalty. Timberg, "The Antitrust Aspects of Merchandising Modern Music", 19 Law & Contemp. Prob. 294, 308 (1954). See, e.g., 1A R. Callman, Unfair Competition, Trademarks & Monopolies § 4.56 at 60 & n.31 (4th ed. 1981) (citing cases); Besser Mfg. Co. v. United States, 343 U.S. 444, 447 (1952); International Salt Co. v. United States, 332 U.S. 392, 398 n.7 (1947). As the analysis in these cases suggests, the principal concern in seeking to determine a reasonable royalty is the policy of encouraging competition in the relevant industry and avoiding inflated pricing resulting from artificial market control. See, e.g., Int'l Salt Co. v. United States, supra, 332 U.S. at 401; United States v. Hartford Empire Co., 65 F.Supp. 271, 275-76 (N.D. Ohio 1946) (citing cases). Nonetheless, this goal did not lead those courts to attempt to construct a model of a perfectly

competitive market, presumably because the antitrust laws do not compel such a pristine form of competition, because other relevant statutes -- such as the patent laws -- may embody important countervailing policies, and because there is generally no data available to recreate such a hypothetical market.

The same limitations are evident here. Perfect competition is required neither by the antitrust laws or by the Decree. Moreover, the policies underlying the Copyright Act are at least potentially relevant to the court's analysis, depending of course upon the nature of the evidence adduced. Furthermore, since there is no competitive market in music rights, the parties and the Court lack any economic data that may be readily translated into a measure of competitive pricing for the rights in question. See, e.g., Sobel, supra, 3 Loyola Ent. L.J. at 33-34, 41; Cirace, supra, 47 Ford. L. Rev. at 277. Of necessity, then, we must look to very imperfect surrogates, particularly agreements reached either by these parties or by others for the purchase of comparable rights. See, e.g., Amusement & Music Operators Assn. v. Copyright Royalty Tribunal, 676 F.2d 1144, 1155-57 (7th Cir.), cert. denied, 459 U.S. 907 (1982); In re Buffalo Broadcasting Co., Memorandum and Order at 12-17 (S.D.N.Y. Feb. 17, 1987); In re Home Box Office, Inc., Memorandum & Order at 4-16 (S.D.N.Y. July 11, 1986); In re Showtime/The Movie Channel, Inc., Opinion and Order at 8-23 (S.D.N.Y. Jan. 14, 1985); In re American Broadcasting Companies,

Inc., Findings of Fact & Conclusions of Law at 8 (S.D.N.Y. May 26, 1982). Such an exercise of course requires not only an analysis of comparability, but also consideration of the degree to which the assertedly analogous market under examination reflects an adequate degree of competition to justify reliance on agreements that it has spawned.

Bearing these general standards in mind, I turn to the specific disputes in this case. As will be seen, the parties have not sought to inject into this proceeding any policies other than the need for setting a fee that reasonably approximates a competitive market rate. (E.g., Tr. 107) (ASCAP views "arm length" negotiated agreements as indicators of competitive market rates.) Rather, the core of the controversy involves disagreements as to the adequacy of each side's chosen surrogates, as well as an implicit disagreement as to the nature of the rights that must be priced.

B. The HBO & Disney Rates

ASCAP relies principally upon a variation of the rates agreed to by HBO for the 1980-to-1982 and the 1983-to-1985 periods. Both of these sets of agreements involved payments of a flat sum, but if calculated on a per-subscriber basis, the 1980-82 fees amounted

to either \$0.20 or \$0.24 and the 1983-85 fees amounted to approximately \$0.25 per subscriber. ASCAP also seeks to invoke an offer by HBO in December 1985 to renew its license agreement with ASCAP for an additional term on essentially the same conditions, except explicitly stated in terms of a "per-subscriber" rate of \$0.24.1. ASCAP additionally cites the agreement of Disney Channel to an arguably similar rate for the period April 18, 1983 to December 31, 1985.⁹

SMC has launched a systematic attack on this approach, premised principally on the theory that ASCAP is a monopolist supplier of music rights, and therefore the results of its negotiations with music users merely ratify monopoly pricing. SMC also attacks the comparability of HBO's and Disney's agreements and suggests as well that if other negotiated fee arrangements must be looked to, they should be its own arrangements with BMI, which is ASCAP's principal rival in the music licensing industry.

⁹ In its original version of the Joint Pre-trial Statement ASCAP pressed for a substantially higher rate based on an analogy to the rates being paid by the television networks. In the course of that presentation ASCAP argued at some length that prior agreements with the cable program suppliers were not reliable guides to a fee for SMC. (See also Tr. 124-28.) Although its current position is, of course, inconsistent with the earlier version of its case, I do not view ASCAP as bound in any sense by its superseded analysis. At most, this sequence of events underscores the fact that the entire process of rate-setting under the Consent Decree inevitably involves a significant degree of discretion in evolving an appropriate analysis precisely because of the lack of any competitive market data or reasonably precise alternate standards.

We may accept as a general proposition that HBO and SMC are similarly situated since they are the two largest pay cable program suppliers, they supply a comparable range of programming with comparable use of music, they receive generally comparable payments on a per-subscriber basis from the cable system operators and each regards the other as its principal competitor for the growing pay cable TV market. (E.g., Tr. 320-21, 331-35, 342-46, 348-54, 404; JPS at ¶¶ 6, 7.) Although SMC argues at length that HBO's greater commercial success during the relevant period -- principally in terms of number of subscribers and costs (e.g., Tr. 357-58, 368-69, 384; SMC Exh. D) -- undercuts ASCAP's reliance on it as a comparable purchaser of rights, I find this argument to be unpersuasive. We can scarcely expect to find two purchasers of music rights who are in all respects identically situated, and this fact does not in itself preclude some measure of reliance on one purchaser's agreement as an indicator of reasonable rates for another purchaser, particularly in view of the somewhat impressionistic nature of this rate-setting exercise. Moreover, in this case the rate proposal of ASCAP would translate the HBO payments into a "per subscriber" figure, thus addressing at least the disparity in subscriber levels between HBO and SMC.¹⁰

¹⁰ I note that if the HBO-ASCAP agreements actually reflected a competitive market rate, then the degree of HBO's commercial success would plainly be irrelevant since all purchasers in a competitive market receive the same price. Indeed, both parties appear to assume in any event that relative profitability should

That said, I nonetheless conclude, for a number of reasons, that the fees agreed to by HBO for 1980 through 1985, even if translated into a per-subscriber figure, have not been shown to constitute a reasonable rate for SMC.¹¹ Similarly, the cited Disney agreement does not constitute an appropriate model.

Most obviously, the terms of the cited agreements and offers, as well as the particular circumstances in which they were negotiated, demonstrate that they do not support ASCAP's requested rate for SMC. Furthermore, as a more general matter, ASCAP's substantial control of the market for the music rights of its members and the cable companies' past perception that they had virtually no economically viable alternative to a negotiated fee for ASCAP's blanket license caution against assuming that the rates incorporated in the agreements and offer cited by ASCAP represent a reasonable rate for SMC. I first address the specifics of the cited agreements and offer.

not control. (E.g., Tr. 103; Gerber Dep. at 136-37; Deposition of Ross Charap at 188 (SMC Exh. V).)

¹¹ Under the Decree ASCAP bears the burden of establishing the reasonableness of its requested fee.

1. HBO and Disney Licenses Distinguished

The agreement between ASCAP and HBO for the 1980-82 period was reached at an early stage of HBO's commercial success, and specifically provided that it was "experimental" in nature. (Joint Exh. 7 at ¶ 1(C); Charap Dep. at 34.) It is doubtful, therefore, that it reflects an educated assessment by HBO of its long-term prospects, much less of the value of the ASCAP repertory to its anticipated success. In any event, this early period is well before the time period at issue here.

As for the HBO-ASCAP agreement covering the 1983-85 period, it included a so-called "most favored nation" provision under which HBO would be entitled to a reduction in its fee if ASCAP subsequently reached agreement with SMC on a fee that was lower than the rate charged to HBO. (Joint Exh. 8 at ¶ 4(A).) Whatever may have been the likelihood of such an eventuality,¹² HBO's insistence on this clause undercuts the notion that it was agreeing, without qualification, to pay the amounts specified in the agreement. (See Deposition of Howard Schlieff at 121-22, 190-

¹² The parties' efforts to settle this case, which have been noted from time to time, suggest that this possibility was not entirely illusory, at least when HBO and ASCAP actually entered into their agreement. See, e.g., David v. Showtime/The Movie Channel, supra, 697 F. Supp. at 754.

94, 247-48.)¹³ Of necessity, then, any valuation of the benefit of the bargain to ASCAP would have to reflect a discount from the amounts stated in the contract in order to account for this contingency, although the amount of such a reduction is entirely a matter of speculation on the present record.¹⁴

Still another technical problem with the use of the 1983-85 HBO agreement as a model for SMC is that it was not cast in the form of a per-subscriber rate.¹⁵ Rather, it stated the fee simply as a sum certain to be paid over a specified period of time. This is significant for our purposes because HBO's negotiator has testified credibly, and without contradiction, that in agreeing to the sums embodied in the agreement for the period 1983 to 1985, HBO was relying upon certain projections of future subscriber growth. In the end, it turned out that these projections were over-optimistic and, as a result, the sums reflected in the 1983-85 agreement amounted in effect to approximately \$0.25 per subscriber. (Schlieff Dep. at 109-10, 114-15, 182-83.)

¹³ The deposition of Mr. Schlieff was received as SMC Exh. S.

¹⁴ An alternative argument is made by SMC based on the "without prejudice" language of the HBO-ASCAP agreement. In effect SMC argues that this provision bars ASCAP from relying on the terms of the HBO agreement in this proceeding. (See Schlieff Dep. at 145.) This notion is questionable in view of the actual language of the agreement, which appears to be intended to protect HBO, not SMC. (See Joint Exh. 8 at ¶ 1(E), 11.)

¹⁵ The HBO offer of December 1985 was cast in the form of a per-subscriber rate.

The point of this distinction is that, if called upon to agree to a \$0.25 per subscriber rate for the 1983-85 period -- or an absolute sum that would have yielded this per-subscriber figure if HBO's projections proved accurate -- HBO might have declined to do so; at the very least, ASCAP has not demonstrated by virtue of invoking the 1983-85 contract that HBO would have agreed. Accordingly, the underlying premise of ASCAP's reliance on the HBO agreements -- that HBO willingly entered into one or more agreements to pay \$0.25 per subscriber to ASCAP for a blanket license -- is not borne out by the record.

As for HBO's offer in December 1985 to extend its agreement with ASCAP at a rate of \$0.24.1 per subscriber (ASCAP Exh. 2), ASCAP seeks to introduce this proposal for various purposes. Principally, the offer is said to be relevant as evidence of HBO's willingness to pay that rate at that time for the blanket license and thus as probative of what a reasonable rate would be for a similar time period. In addition, ASCAP argues that this offer undercuts the assertion by HBO's negotiator, Mr. Schlieff, that in negotiating the agreement for the preceding period -- 1983 to 1985 -- HBO would have been unwilling to pay more than approximately \$0.20 per subscriber. SMC objects to consideration of the offer for these purposes, citing Fed.R.Evid. 408.

This proposal by HBO was invoked by ASCAP in another proceeding, commenced by HBO, and was rejected by this Court as inadmissible for this purpose under Fed.R. Evid. 408 and the implicit policy of the Consent Decree. See In re Home Box Office, Inc., Memorandum and Order at 16-19 (S.D.N.Y. July 11, 1986.) In this instance I find it admissible although not especially probative.

The principal distinction between the two cases is that in this proceeding ASCAP does not seek to use the "settlement" offer of HBO against the offeror. The offer was made to avoid a proceeding concerning HBO's fees, and it is now being offered in a proceeding that is designed to set a fee for SMC.

Although at least one court has indicated that the common-law rule against admission of statements made in the course of settlement discussions applies only between the parties to the negotiation, see Huntley v. Snider, 86 F.2d 539, 540 (1st Cir. 1936), the Second Circuit has not so limited Rule 408. Instead, it and other courts have indicated that Rule 408 may bar introduction of settlement discussions, or agreements, even if the settlement involved another case and a different party. See Playboy Enterprises, Inc. v. Chuckleberry Pub. Inc., 687 F.2d 563, 568-69 (2d Cir. 1982); see also American Ins. Co. v. North America Co., 697 F.2d 79, 82 (2d Cir. 1982). Accord, U.S. v. Contra Costa

County Water District, 678 F.2d 90, 92 (9th Cir. 1982); Young v. Verson Allsteel Press Co., 539 F. Supp. 193, 196 (E.D. Pa. 1982).¹⁶

It must be noted, however, that these decisions all involved the proposed use of the offer against either the offeror or another party to the settlement. This distinction is significant because the most commonly accepted rationale for Rule 408 is that it encourages settlement by protecting parties to a settlement agreement or negotiation from having their good-faith efforts to settle a dispute used against them in subsequent litigation. As the Second Circuit has noted:

Settlements have always been looked on with favor, and courts have deemed it against public policy to subject a person who has compromised a claim to the hazard of having a settlement proved in a subsequent lawsuit by another person asserting a cause of action arising out of the same transaction.

Hawthorne v. Eckerson Co., 77 F.2d 844, 847 (2d Cir. 1935).

Although Wigmore suggests that the underlying concern is one of relevance -- that "an offer of compromise. . . does not ordinarily proceed from and imply a specific belief that the adversary claim is well-founded. . . . " 4 C. Wigmore, Evidence § 1061 at 36 (Chadborne rev. 1972) (emphasis in original) -- this view has generally been rejected, since an offer may in fact be quite probative as to liability or damages, particularly if the

¹⁶ Rule 408 bars the use of such evidence only for the purpose of establishing either liability or the amount of damages.

offered amount is close to the figure that represents the adversary's maximum supportable damage claim. See, e.g., 2 J. Weinstein & M. Berger, Weinstein's Evidence ¶ 408 [02] at 408-17 to 20 (1986); Morgan, Basic Problems of Evidence 210-11 (1962); Cleary, McCormick on Evidence § 274, at 812-13 (3rd ed. 1984). But see United States v. 46,672.96 Acres of Land, More or Less, 521 F.2d 13, 17 (10th Cir. 1975) (evidence of prices paid to avoid condemnation proceedings). Instead, as Judge Weinstein notes, "Rule 408 is based upon the policy of aiding the compromise and settlement of disputes." 2 Weinstein's Evidence, supra, at 408-19 (citing cases). See, e.g., Fed.R. Evid. 408 Notes of Advisory Committee (stating that this is "[a] more consistently impressive ground" for the Rule); S. Rep. No. 93-1277, 93d Cong. 2d Sess. (1974), reprinted in 1974 U.S. Code, Cong. & Admin. News 7051, 7056; C. Wright & K. Graham, Federal Practice & Procedure § 5302, at 173 (1980); Trebor Sportswear Co. v. The Limited Stores, Inc., 865 F.2d 506, 510 (2d Cir. 1989); Fiberglass Insulators, Inc. v. Dupuy, 856 F.2d 652, 654-55 (4th Cir. 1988).

The implication of this policy for our case is that settlement offers or agreements are not automatically inadmissible -- even as to liability or the amount of damages -- if they are offered against a party who was not a participant in the settlement discussions or agreement. See Kennon v. Slipstreamer, Inc., 794 F.2d 1067, 1075-76 (5th Cir. 1986) (Thornberry, J., dissenting).

Rather the Court must assess the degree of relevance and potential prejudice of the evidence in light of the particular circumstances of the case. See e.g., Wyatt v. Security Inn Food & Beverage Inc., 819 F.2d 69, 71 (4th Cir. 1987); Kennon v. Slipstreamer, Inc. supra, 754 F.2d at 1076 (Thornberry, J., dissenting) (suggesting applicability of Fed.R. Evid. 403).

In this case the introduction of the HBO offer against SMC plainly does not pose the same danger to the policy of encouraging settlements as would the proscribed use of such an offer against HBO itself. Furthermore, in this unusual type of proceeding, it may fairly be said that a significant part of the court's inquiry inevitably concerns the process of negotiation by would-be licenses for blanket licenses from ASCAP and other comparable entities. Although we may conclude, for various reasons, that some of these negotiations and agreements are not reliable indicators of a reasonable fee for SMC, there is no cogent reason for finding that the 1985 HBO offer is so uniquely irrelevant to our inquiry that it should not find its way into the evidentiary record for this purpose.

As for potential prejudice, I note that all of the many offers and agreements that are being cited by ASCAP and SMC are being subjected to close scrutiny by the Court and will not be relied upon to any greater extent than is justified by the particular

circumstances in which they were made. As will be seen, I find that HBO's having made its 1985 offer does not demonstrate the appropriateness of imposing that proposal on SMC; nonetheless, it is admissible as at least relevant to that issue since admission would not contravene the policy underlying Rule 408.¹⁷

Although admissible, HBO's offer is not persuasive as proof of what would be a "reasonable" rate for SMC. The HBO offer was to renew the prior agreement, and that prior contract encompassed a "most favored nation" provision. Thus, even if it had been accepted by ASCAP, HBO could ultimately have achieved a lower fee if ASCAP settled with SMC. Accordingly, HBO's fee proposal does not represent an unconditional agreement to pay the quoted fee. (E.g., Schlieff Dep. at 121-22, 190-94, 247-48.)¹⁸

¹⁷ One could argue that HBO might be prejudiced in the long run by introduction of its offer here, since it could affect the decision of the Court with respect to SMC's license and this result could in turn affect the result in HBO's pending fee proceeding. This argument, however, encompasses a far greater degree of speculativeness than the Court is prepared to accept on the current record, even if we assumed that SMC has standing to object on this ground.

¹⁸ The HBO offer does raise some question as to whether, if pressed in 1983, HBO would have agreed to a higher fee than \$0.20 per subscriber. Even taking this possibility into account, I find that proposition to be entirely speculative on the current record. Moreover, for reasons to be noted in our discussion of relative bargaining leverage, the fact that HBO might at some point have been willing to pay \$0.24 per subscriber does not, in itself demonstrate that such a fee is appropriate for SMC in an Article IX proceeding.

The final agreement that ASCAP cites in support of a \$0.25 per subscriber fee for SMC is the Disney Channel license, which involved payments variously estimated as amounting to \$0.21 to \$0.29 per subscriber for the period from April 1983 to the end of 1985. (Joint Exh. 10.) The principal problem with the proposed use of this agreement is that the Walt Disney Music Company owns the rights to much of the music aired on the Disney Channel and is a member of ASCAP. Accordingly, the use by the Disney Channel of that copyrighted music as a significant portion of the musical fare on its programming means that the Disney organization will recoup a large portion of the moneys it pays to ASCAP by way of royalties to its publishing house. (Deposition of Peter Nolan at 50, 52.)¹⁹ Thus, in effect, Disney ends up paying substantially less than \$0.25 per subscriber²⁰, and indeed this consideration apparently contributed significantly to its willingness to agree to the fee that ASCAP now seeks to impose on SMC. (See Charap Dep. at 287-89; Nolan Dep. at 52, 61.) Furthermore, I note that the Disney Channel agreed to these fees at an early stage of its existence, when it was seeking to minimize substantial unplanned expenses -- such as the cost of litigation in the rate court, with the attendant risk of an unfavorable outcome -- and that its agreement

¹⁹ The deposition of Mr. Nolan was received as SMC Exh. T.

²⁰ Apparently Disney recoups approximately \$ [confidential material redacted] per dollar paid to ASCAP. (Nolan Dep. at 56.) This would reduce the per subscriber cost to approximately \$ [confidential material redacted].

to the stated fees for that early period appears to reflect a host of considerations that would undercut any assumption that the agreed-upon rate was representative of what a competitive market would produce. (See Nolan Dep. at 60-61, 129-30.)

2. Inequality of Bargaining Power

The more global difficulty with ASCAP's reliance on any of these various agreements or offers is that, although they resulted from so-called "arms length" negotiations, they do not necessarily reflect rates that have a discernible relationship to what a competitive -- or even partially competitive -- market would produce, and ASCAP offers no other persuasive reason for relying on them.

We start from the premise, adopted in prior fee-setting decisions, that license agreements entered into by parties in circumstances comparable to those of the litigants may provide guidance in setting a reasonable fee in a rate proceeding. See e.g., In re Buffalo Broadcasting Co., Memorandum & Order at 12-17 (S.D.N.Y. Feb. 17, 1987); In re Home Box Office, Inc., Memorandum & Order at 3-16 (S.D.N.Y. July 11, 1986); In re Showtime/The Movie Channel Inc., Opinion and Order at 8-23 (S.D.N.Y. Jan. 14, 1985). Accord, Amusement & Music Operators Ass'n v. Copyright Royalty

Tribunal, supra, 676 F.2d at 1155-57. Cf. Krinsk v. Fund Asset Management Inc., 875 F.2d 404, 411-12 (2d Cir. 1989). The relevance of such agreements depends upon whether they can fairly be viewed as the product of market control by ASCAP or as some indication of what prices would be set in a comparatively competitive market. Plainly, if the terms of the agreement reflect the fact that the licensee had no realistic alternative, it would be fair to infer that those agreements could not be the source of a "reasonable" fee. Cf. Gartenberg v. Merrill Lynch Asset Management, Inc., 694 F.2d 923, 929 (2d Cir. 1982).

To assess the relevance of these "comparable" agreements, we must address two questions -- first, does ASCAP have the sort of leverage that, if utilized, would likely compel the cable program suppliers to agree to non-competitive, or excessive, fee levels, and, second, has ASCAP in fact exerted such leverage to achieve this result. The answer to both questions is a qualified "yes".

In order to compete effectively, SMC and the other cable companies must have licenses covering their use of all of the music encompassed in the type of programming for which their subscribers are paying. In part for historical reasons of industry practice, they have come to rely exclusively on blanket licenses issued by ASCAP, BMI and the third of the music licensing societies, SESAC, rather than seeking licensing from another source -- such as the

composers themselves (direct licensing) or the producers of the programming that they purchase (source licensing) -- or demanding per-program licensing from the societies. (E.g., Tr. 491-92, 746-50.)

Because SMC and its competitors have come to rely on the blanket license, the societies -- particularly ASCAP, which is the largest of these organizations -- have acquired a significant degree of bargaining leverage. This has occurred because of the perception on the part of most, if not all, of the cable companies that they have no realistic alternative to meeting ASCAP's irreducible demands. (E.g., Tr. 456-60, 746-50.) Based on this claimed lack of any economically viable alternative to the blanket license, SMC argues that negotiations serve merely to validate the monopolistic prices that ASCAP can extract by virtue of its stranglehold on the market for use by its member's music.

ASCAP strongly disputes the notion that it is "a monopolist" and urges that if SMC's premise is rejected, then the negotiated agreements may be relied upon in setting fees. It particularly cites court decisions in two cases that have rejected antitrust challenges to its use of the blanket license. One involved a challenge by the CBS television network and the other a suit by a nationwide group of local television stations. In each case the court, in effect, found that the plaintiffs there had not

demonstrated that they lacked alternatives to the blanket license as a means of access to the music used on their programs, and therefore they had not demonstrated that ASCAP's use of the blanket license involved an unreasonable "restraint of trade" under section 1 of the Sherman Act. See BMI v. CBS, 441 U.S. 1, 23-24 (1979), rev'g, 562 F.2d 130 (2d Cir. 1977), rev'g, 400 F. Supp. 737 (S.D.N.Y. 1975); CBS v. ASCAP, 620 F.2d 930, 935 (2d Cir. 1980) (on remand from 441 U.S. 1), cert. denied, 450 U.S. 970 (1981); Buffalo Broadcasting Inc. v. ASCAP, 744 F.2d 917, 924-33 (2d Cir. 1984), cert. denied, 469 U.S. 1211 (1985).

The parties' dispute over the significance of these decisions for the present case appears in some measure to skirt the point. Even if the mode of analysis in these cases were directly pertinent here, it is questionable whether these decisions would control with respect to SMC. In any event, these cases are not directly relevant.

We may fairly accept, at least as a possibility, that if CBS or the local television stations chose to undertake source or direct licensing or utilized the per-program license either as an economic alternative or as a bridge to full source or direct licensing, they might in the long run limit the economic leverage exercised by ASCAP through its use of the blanket license. Indeed, despite the contrary testimony of SMC's economic expert, Dr.

Benston, it appears that the decisions in CBS and Buffalo Broadcasting compel us to acknowledge this possibility since the plaintiffs in both of those cases offered virtually identical expert testimony and the courts nonetheless concluded that restraint of trade by use of the blanket license had not been proven.

It is also certainly conceivable that if HBO (or the Disney Channel or SMC) chose to forego a blanket license in favor of attempting source or direct licensing, it might in the long run obtain licensing coverage for much if not all of its programming. In the meantime, to bridge the gap, it would still have to pay for a blanket license or a per-program license (if ASCAP relented from its initial refusal to quote a fee for such a license), or else forego a substantial part of its programming. Even if HBO survived the inevitably higher costs and competitive disadvantages viz-a-viz the other cable companies during this interregnum, it is fair to assume that in the long term the pursuit of such an endeavor would not save the company much, if any, money since copyright holders would have no incentive to agree to lower rates than those paid to them now via ASCAP, and HBO would then be saddled in futuro with the substantial costs that it now avoids by reliance on the blanket license. (Tr. 545-51.) (See also Schlieff Dep. at 85-86.) See generally Cirace, supra, 47 Ford. L. Rev. at 292 n. 99.

We must further bear in mind that the individual cable companies might well find it more difficult than either CBS or the nationally organized local television industry to induce large numbers of copyright holders to forego reliance on the blanket license. CBS is, of course, one of a small handful of national networks,²¹ with the advantages of a very high public profile, substantially greater revenues than the individual cable companies, more control over the content of its programming, and a parent that controls a large business in music publication. As the Second Circuit noted in rejecting CBS's antitrust challenge, "we have some difficulty even contemplating the feared situation of individual songwriters displaying reluctance to arrange to have their songs performed on a national television network, especially one owned by 'the giant of the world in the use of music rights.'" CBS v. ASCAP, supra, 620 F.2d at 937-38 (quoting CBS v. ASCAP, supra, 400 F. Supp. at 771).²²

As for the local television stations, they have the bargaining advantage of negotiating jointly through their All-Industry Committee. See, e.g., Sobel, supra, 3 Loyola Ent. L.J. at 39-40

²¹ The market of national networks -- whether defined as three or four -- is small enough to be considered "highly concentrated." See Sobel, supra, 3 Loyola Ent. J. at 31.

²² The Circuit Court went on to uphold Judge Lasker's finding, based on the trial record in that case, that "if CBS were to seek direct licensing, 'copyright proprietors would wait at CBS' door.'" 620 F.2d at 938 (quoting 400 F. Supp. at 779).

(countervailing power of organized buyers); see also id. at 31-32)(in the music industry, if three or fewer major buyers, they "have substantial monopsony power -- the power to lower prices.") (quoting Cirace, supra, 47 Ford. L. Rev. at 281 n.34). The local stations have the further advantage that by virtue of their number they represent a much larger source of revenue to ASCAP and a much more difficult industry to police for copyright infringement. Id. at 34, 40 (substantial cost to sellers of policing large number of potential users for infringing activities limits seller's ability to charge above competitive price).²³ These circumstance also suggest that they may be able to negotiate on more equal terms with ASCAP than could the individual cable program suppliers. See Broadcast Music, Inc. v. Moor Law, Inc., 527 F. Supp. 758, 764 (D. Del. 1981., aff'd mem., 691 F.2d 590 (3d Cir. 1982)).

In any event, we need not speculate as to whether the circumstances in which HBO and Disney found themselves in the mid-1980's were sufficiently dissimilar to those of CBS and the local television stations to have permitted an antitrust challenge by the

²³ Although current number are uncertain, the All-Industry Committee apparently represents well over 800 stations (JPS at ¶ 51) and the annual fees payable under the most recent interim fee order for the blanket license total \$60 million. (JPS at ¶ 54.) By comparison, if ASCAP were awarded the fee it seeks from SMC in this proceeding its annual revenue would amount to approximately \$[confidential material redacted].

cable companies.²⁴ Our concern is to set a fair rate for the blanket license on the assumption that its use by ASCAP is consistent with the antitrust laws. What is relevant for our purposes is the relative bargaining power of ASCAP and the cable companies in negotiating a price for the blanket license. If the negotiating parties exert generally equivalent bargaining leverage, the results may be viewed as a reasonable equivalent of a competitive market. See, e.g., Sobel, supra, 3 Loyola Ent. L.J. at 39 (citing, inter alia, J. Bain, Industrial Organization 152 (2d ed. 1968)). If not, it is doubtful whether the resulting agreements are appropriate guides to a reasonable rate.

For the reasons already noted, it is questionable whether any of the cable companies could have made effective use of direct or source licensing, especially within the limited time period in which the blanket license agreements cited by ASCAP were concluded. Furthermore, the principal other alternative suggested in CBS and Buffalo Broadcasting -- the use of a per-program license -- has until now apparently been for all practical purposes unavailable

²⁴ I note that in a concurring opinion in Buffalo Broadcasting, Judge Winter suggested that CBS and Buffalo Broadcasting demonstrate that the blanket license can never be deemed to violate section 1 of the Sherman Act. 744 F.2d at 933-34. It appears that the other members of the panel were not prepared to adhere to that conclusion. See id. at 924-25 (indicating the necessity of examining the effect of blanket license on the specific category of users involved in that case); id. at 933 ("the context in which the blanket license is challenged can have a significant bearing on the outcome").

to HBO and the other cable program suppliers since ASCAP has declined until recently to make one available to them based on its interpretation of the Consent Decree. (See pp. 69-72, infra.)²⁵

The one remaining alternative, invocation of the rate court's jurisdiction, has always been available, although the testimony of both SMC's representatives and especially the negotiators for the other cable companies suggests that they looked upon this Court with what can fairly be described as measured aversion. (E.g., Nolan Dep. at 60; Schlieff Dep. at 92, 103.) Their concerns, as expressed in testimony, involved both the belief that this Court was "ASCAP-friendly," and the assumption that participation in a rate proceeding was exceedingly expensive. How expensive is not made clear on the present record, although the unstated implication is that they assumed that the added expense exceeded the likely reduction, if any, that they would obtain from ASCAP's demanded fees.²⁶ Cf. Buffalo Broadcasting Co. v. ASCAP, supra, 744 F.2d at

²⁵ Whether the cable companies could have compelled the issuance of such a license by resort to the rate court is uncertain, given the lack of any definitive ruling until now on the meaning of Article V, and in any event such an alternative obviously involved some additional expense as well as uncertainty with respect to both the merits of the decree construction issue and the costliness of the license that would ultimately be made available.

²⁶ Although ASCAP would presumably be required to pay an equivalent cost in litigation (Tr. 810-11), its assumption that the Court would view its position with favor would probably justify the expenditure involved, particularly since a favorable ruling would inevitably have substantial and very beneficial effects on its negotiating position with other similarly situated licensees.

927 (television stations described as "represented by a vigorous committee with the demonstrated resources, skill, and willingness to invoke the rate-adjustment process.")

Regardless of how these witnesses characterize their reasons for not resorting to the rate court, their testimony is at least credible in indicating that their decision was not based on any purported assumption that the rates that they agreed to were in any meaningful sense "reasonable." Rather, given the absence of any track record in the rate court and the fact that such a proceeding would probably be expensive, a cautious businessman would likely opt for even a fairly high fee to avoid both the uncertainty of the alternative result and the likelihood of substantial expense involved in pursuing it. Furthermore, since the amounts of money payable even under the ASCAP formula do not constitute a large proportion of the companies' overall costs, it was certainly understandable for these companies to agree to payments that they may have viewed as "excessive."

In short, it may fairly be said that there have been substantial constraints, both objective and subjective, on the willingness of the cable companies to invoke alternatives to ASCAP's blanket license demands. Whether these constraints were realistically assessed by the would-be ASCAP licensees may have been a crucial question for the antitrust suits, in which the

plaintiffs bore the burden of proving that ASCAP (and BMI) used the blanket license to restrain competition unreasonably, but it is not so in this setting, in which ASCAP bears the burden of demonstrating that the rate it seeks is reasonable and that such reasonableness can be measured by what some of the cable companies agreed to pay in the past. Even if these companies were mistaken in believing they lacked viable options, their bona fide belief that this was the fact is relevant in assessing whether the negotiated agreements are an appropriate measure of a reasonable fee.

Based on a review of the testimony of record and the data on other licensing agreements, I conclude that the cable companies -- much like the networks, local television stations and other licensees -- have in fact assumed in the past that direct or source licensing was economically unfeasible and that per-program licenses, even if offered by ASCAP or ordered by the rate court, would be too expensive.²⁷ It appears as well that the cable companies other than SMC also assumed -- whether correctly or not -- that the rate court was not an economical alternative for them,

²⁷ The latter view has apparently changed to a degree -- at least on the part of the local television stations -- in the wake of this Court's interim fee decision in the Buffalo Broadcasting proceeding. (See Memorandum and Order dated February 17, 1987 at 28-37.) The Court ordered the issuance of per-program licenses on terms later more fully fleshed out by stipulation of their parties, and apparently some number of local stations have opted for this approach in lieu of the blanket license.

presumably because it was thought to be a costly process and one fraught with uncertainty as to the ultimate result.²⁸ (E.g., Schlieff Dep. at 103-05; see also Tr. 573-74.)

The validity of these assumptions is not crucial for our purposes; this is not an antitrust suit and we are not called on to determine whether ASCAP has violated the Sherman Act. It suffices to observe that the concerns of the cable companies appear to have constrained their negotiating posture, and this supports the conclusion that prior negotiated agreements -- even though agreed to after "arm's length" negotiations -- are not necessarily appropriate as a dollar-for-dollar measure of a "reasonable fee" for SMC.²⁹

²⁸ The willingness of these companies to forego a rate proceeding may also have been enhanced by their assumption that the current proceeding, in which SMC bears the entire financial cost of pressing the cable industry's position, would provide a definitive result without cost for those on the sidelines. (See, e.g., Nolan Dep. at 60.)

²⁹ ASCAP urges that we not take at face value the attempts by the cable companies' negotiators to characterize the results of their arms-length negotiations as unfair to them or extortionate. I do not rely upon self-serving characterizations of this sort, but rather look to the observable facts, including both the economic circumstances in which the cable companies' operated and the specific actions that they undertook during the relevant period of time. To the extent that their negotiators have described in testimony the course of negotiations with ASCAP and the rationale for the decisions that they made, I find their testimony in general to be credible as well.

Given the apparent limitations -- whether self-imposed or not -- on the cable companies' bargaining leverage, we would strongly question the appropriateness of relying on the old ASCAP license agreements even if they were not, on their face, readily distinguishable. Moreover, this impression is further reinforced by the evidence that ASCAP's posture in negotiations took advantage of this apparent weakness in its interlocutors' position. In short, it may fairly be concluded that the agreements reached by ASCAP with the cable licensees reflect a de facto but significant inequality of bargaining leverage.

Represented by counsel who has had substantial experience in dealing on ASCAP's behalf with the broadcasting industry, ASCAP appears to have followed a sophisticated approach to maximize its long-term revenues. ASCAP routinely issues a license at no fee or a nominal fee to fledgling companies, in the hope that they will prosper and ultimately be able to afford substantial fees. (Charap Dep. at 201-02.) Upon realization of this goal, ASCAP typically has demanded, as a price for re-licensing, sharply increased fee levels at each renewal. (E.g., Schlieff Dep. at 50-51; Gerber Dep. at 47-50; Charap Dep. at 102, 116-18; see Fagan Dep. at 47-48.) See also Cirace, supra, 47 Ford. L. Rev. at 287-88. In so doing ASCAP has chosen in each instance to negotiate an agreement first with the largest music user in the industry -- in this case HBO -- and has then used that agreement as a floor in its dealings with

the other companies, based on its invocation of Article IV(C), the non-discrimination provision of the Consent Decree. (Tr. 848-49; Gerber Dep. at 58, 90; Charap Dep. at 18-21, 80, 85, 110-12, 115.)³⁰ In conducting these negotiations ASCAP's representatives have also taken pains to impress upon the licensees the expense and uncertainty of any resort to the rate court, with the attendant threat that ASCAP would seek far higher fees in court. (Tr. 837-40; Charap Dep. at 60.) The unmistakable message conveyed is that ASCAP viewed the rate court as a receptive forum for its views and that the licensee would be well advised to settle since the rate court might award fees substantially in excess of those then being offered by ASCAP. (E.g., Schlieff Dep. at 236-39; see also Charap Dep. at 60, 63-64.)

In addition, in its dealings with the cable program suppliers ASCAP has in the past declined to offer any per-program license at all, citing its own reading of Article VII(B) of the Consent Decree. Although the attorneys for the cable companies might have advised their clients that this reading was doubtful --indeed, that

³⁰ Article IV(C) provides: "Defendant ASCAP is hereby enjoined and restrained from: . . . (c) Entering into, recognizing, enforcing, or claiming any rights under any license for rights of public performance which discriminates in license fees or other terms and conditions between licensees similarly situated."

issue is now before this Court -- the prospect of having to litigate both that legal issue and the appropriate fee for a per-program license served in effect as a further deterrent to the cable companies resorting to this forum.

These negotiating tactics are cited, not in criticism of ASCAP, but rather as indicative of the fact that ASCAP's negotiating posture has been forceful, and has taken advantage of perceived weaknesses in the licensees' negotiating posture. The point is not that there are no objective constraints on ASCAP's negotiating leverage, but rather that the conjunction of these factors has led to negotiated fees seemingly in excess of what one would expect to be produced if the licensees did not believe themselves largely constrained to obtain a blanket license on the basis of a negotiated settlement with ASCAP.³¹

This conclusion is buttressed by the seeming anomaly that these same licensees have reached agreements with ASCAP's principal

³¹ These conclusions are in no respect inconsistent with the antitrust decisions in CBS and Buffalo Broadcasting, which are invoked by ASCAP. As noted, both of these cases involved an assessment of whether in fact, the plaintiffs there had proven that they lacked a realistic alternative to the blanket license. Moreover, even if ASCAP had monopoly power, its mere use of that leverage to demand higher prices, as suggested here, would not in itself violate the antitrust laws, see, e.g., United States Football League v. National Football League, 842 F.2d 1335, 1360-61 (2d Cir. 1988), but it would certainly be relevant to this Court's determination of whether a fee should be based on the results of negotiations between ASCAP and its licensees.

counterpart -- BMI -- at markedly lower rates, generally ranging, in effect, from \$0.09 to \$0.13 per subscriber in recent years. (E.g., Gerber Dep. at 118; Schlieff Dep. at 173-74.) The anomalousness of this result rests on several facts. First, although BMI has a smaller repertory than does ASCAP -- approximately one million compositions compared to about three million (see Deposition of Edward Cramer at 11-12)³² -- there seems no question that the cable companies need the same protection with respect to that repertory as they require with regard to the ASCAP music; simply stated, there is so much BMI music enmeshed in their programming that they must obtain a license from BMI. (Tr. 580; Schlieff Dep. at 61-62, 153.) Second, both societies appear about equally well positioned to extract fees for their licenses since they operate under equivalent consent decrees and both offer the blanket license as their principal or sole form of licensing to the cable companies.

Not surprisingly, in their dealings with licensees comparable to the cable program suppliers and with each other, ASCAP and BMI have agreed to fees that are generally in a similar range. (See, e.g., Tr. 95-99; ASCAP Exh. 3.) Thus, their respective blanket licenses with the television networks reflect a ratio between ASCAP and BMI of approximately 1.18-to-one (Tr. 160, Joint Exhs. 28, 30, 33; ASCAP Exh. 6; JPS at ¶¶ 44-50), even though the networks use

³² The deposition of Mr. Cramer was received as SMC Exh. X.

far more ASCAP than BMI music (Tr. 191); their agreements with the local television industry reflect a ratio of about 1.43-to-one (ASCAP Exh. 5); their agreements with the local radio industry reflect a ratio of about 1.16-to-one (Tr. 97); and their licenses with the MTV network provide for virtually equal license rates. (JPS at ¶ 36, SMC Exh. E.)³³ [Confidential material redacted.]

In striking contrast, the agreements cited by ASCAP in this proceeding -- with HBO and Disney -- reflect a far higher fee rate than either of these licensees, or SMC, is paying BMI; indeed the ratio between ASCAP and BMI fees that would result if ASCAP were awarded a \$0.25 rate would be on the order of 2:1. Although ASCAP argues that this far greater differential reflects the cable companies' valuation of the respective blanket licenses issued by ASCAP and BMI, there is little, if anything, in the record to support this conclusion. Indeed, the record plainly demonstrates that the relevant licensees seek the lowest rates that they can obtain from ASCAP and from BMI, and thus the results appear to

³³ The agreement with BMI for 1987 through 1989 covers both the MTV services and SMC and involves a total payment of \$ [confidential material redacted]. According to Viacom's General Counsel, Gregory Ricca, approximately \$[confidential material redacted] of this sum is informally allocated to the MTV services although the agreement is silent on this matter. (Tr. 477-78.) This would yield a payment to BMI of approximately \$[confidential material redacted] per year, as compared to a payment to ASCAP of \$1 million per year. (See JPS at ¶ 36.) Even if we assume, however, that only half of the \$[confidential material redacted] is allocable to the MTV services, the resultant payments for the MTV services to BMI would slightly exceed those made to ASCAP for the same period.

reflect largely the perceived relative bargaining leverage of the negotiating parties. Since a reasoned evaluation of the ASCAP and BMI licenses suggests that their value to the cable companies does not greatly differ -- as we noted, both are plainly necessary for the current operations of the cable program suppliers -- it is reasonable to infer that the ratios reflecting a nearly one-to-one relationship between ASCAP and BMI are better indicators of equivalent bargaining leverage between licensor and licensee, and that the rates cited by ASCAP are therefore probably in excess of a range of reasonable fees.³⁴

The foregoing considerations strongly suggest that \$0.25 is not a reasonable fee for SMC. Moreover, ASCAP's arguments to the contrary do not carry much force. In substance ASCAP suggests that the very fact that HBO and Disney agreed to comparable fees compels the conclusion that they are reasonable rates for SMC. This ipse dixit form of argument fails to explain why those rates are

³⁴ One may speculate as to the reasons why the few cable companies that have entered agreements with both ASCAP and BMI have ended up paying far more to ASCAP. Whether or not this is a product, in some measure, of differing negotiating philosophies or practices on the part of the two societies is uncertain, although the record might support such an inference. (See, e.g., Tr. 579 (noting that BMI agreed to "carve out" provision in blanket license agreement with HBO); Schlieff Dep. at 82-84.) Compare with United States v. ASCAP, 586 F. Supp. 727 (ASCAP successfully resists efforts by networks to obtain "carve out" form of blanket license). In any event, for our purposes it need only be observed that the difference in fees has not been shown on the present record to reflect any meaningful economic distinction between the two licenses or any difference in the licensees' evaluation of the benefits of those licenses.

appropriate surrogates for the "reasonable fee" that we are instructed to set, and fails to deal with the congeries of record evidence suggesting that these rates rest somewhere above a range of reasonable rates.³⁵

C. SMC's Proposal for an Economic Analysis

As an alternative to ASCAP's proposal, SMC urges that an appropriate blanket license fee reflect the intrinsic value of the music that is made available under the license. To that end it offers an elaborate scheme for measuring what it contends is the fair or competitive market value of the music. Although I am ultimately unpersuaded by SMC's case, it deserves some detailed attention.

³⁵ I note that the relevant circumstances in this case differ significantly from those found in the Buffalo Broadcasting interim fee proceeding, in which the applicants were held, in significant measure, to the fee levels that they had agreed to pay in the past. As the Court there noted, for interim fee purposes ASCAP met its initial burden to demonstrate the reasonableness of its proposed fee by showing that the applicants had previously agreed to the same fee level, and in those circumstances the licensees would have to come forward with evidence suggesting that the prior fee level did not reflect a reasonable rate. (Memorandum and Order dated February 17, 1987, at 27.) In this case, SMC has never agreed to the fees reflected in the HBO and Disney agreements, and there is no reason to assume, merely because those other companies accepted them, that they necessarily reflect a reasonable rate rather than the fact of ASCAP's strong bargaining leverage in negotiating with the cable companies over a blanket fee rate. In fact, that is what the record suggests, and accordingly I conclude that ASCAP has failed to carry its burden to demonstrate that \$0.25 per subscriber is a reasonable rate for SMC.

SMC starts from the premise that ASCAP is in fact a monopolist, notwithstanding the arguably contrary conclusions of the Second Circuit and the Supreme Court, and that therefore the Court cannot rely on any of the agreements into which it (or BMI) has entered. Instead, SMC proposes that the Court view music as simply one of a number of so-called creative services utilized in the production of a film or television program, and it suggests that the valuation of such creative services in a more competitive market than the music industry will provide a reliable approximation of how music would be valued in a competitive market.

SMC's specific analysis involves a two-step process in which it utilizes certain data concerning payments made by producers to obtain two other forms of creative services for the production of their films -- screenwriting and direction.³⁶ Since the issue in this proceeding concerns the amounts that should be paid for the right to use copyrighted music in programming on cable television, SMC initially focusses upon the level of payments made to screenwriters and directors in connection with the exhibition of their films on cable television. (Tr. 587-88.) For this data it

³⁶ SMC's analysis focuses solely on made-for-theatre films, although a small percentage of its programming -- twenty percent for Showtime and five percent for The Movie Channel -- does not involve such films. I assume for present purposes that this limitation on its data universe does not seriously bias the results obtained.

looks to the respective collective bargaining agreements of the Screenwriters Guild and the Directors Guild of America, each of which provides for payment of residuals to their members for cable performances, at the rate of 1.2 percent of the amount paid by the pay cable television service to the film distributor. (Id.; Joint Exhs. 37-38.)

If the same figure were applied directly to value music rights in connection with the performance of films or other programming on cable television, the resultant fee for SMC would approximate \$0.32 per subscriber. SMC, however, posits that music is generally a far less important creative element in the artistic, and presumably financial, success of a film than are such inputs as the script, the direction, and the acting. Accordingly, it offers a methodology for discounting from the 1.2 percent figure in order to arrive at an appropriate fee for music use.

To accomplish this task, SMC selected an assertedly representative sample of made-for-theatre films that had been shown on its program services, and then sought to obtain from the producers of these films data indicating the amount of money spent "up front" by the producer to obtain screenwriting, directorial and musical services. (Tr. 590, 595.) Ultimately SMC obtained data of this sort from four studios reflecting either actual outlays or the relative size of such expenses for fifty films. (Tr. 599-

600.)³⁷ They did not receive data from a number of major studios, including Warner, Universal, Columbia and Disney. (Tr. 675-76.) Although the results vary very substantially from film to film, when aggregated they reflect that on average the producers spent substantially less money per film for music than for either screenwriting or directorial services. Indeed, the median figures for each category of expenditure indicate that the typical cost of acquisition of music was approximately one-quarter the average costs of acquiring either screenwriting or directorial services. (Tr. 619; SMC Exh. K.)

Utilizing this four-to-one ratio, SMC argues that the 1.2 percent figure for pay cable residuals contained in the collective bargaining agreements for screenwriters and directors should be reduced by seventy-five percent, to .3 percent, to account for the fair market value of music use in the presentation of SMC programming. This would leave us with a value of about eight cents per subscriber for all music used on SMC. (Tr. 620-21.) Although SMC points out that a substantial quantity of music on its programming comes from the repertory of BMI -- thus justifying a reduction of the already reduced figure to account only for ASCAP's share of the music used on SMC -- it nonetheless proposes to ignore

³⁷ SMC did not compile equivalent data for acting services since those payments vary so substantially as to be unreliable indicators of anything. (Tr. 691-92.)

this final reduction and argues simply that any fee award for a blanket license should not exceed eight cents per subscriber.

Even if we accept arguendo the initial premise of SMC's argument -- that the performing rights societies exert such control of the market for music rights as to preclude any reliance on negotiated agreements -- its analysis in this case does not itself yield a reasonable measure of a fee for ASCAP's license. This conclusion flows from certain technical problems with its methodology and from the fact that its analysis assumes that what the court should be valuing is simply the market value of music as an element of the program, rather than the value of the blanket license itself.

On its face, SMC's attempt to look to the market for other creative inputs as a means of measuring what the market would charge for music acquisition by cable companies is plausible. Its method of doing so, however, is open to serious question. The initial problem with SMC's approach to measuring the value of music is its reliance upon the guild agreement provisions for payment of residuals to screenwriters and directors. These provisions are part of an extensive set of contractual terms that also govern upfront compensation, benefits, and an array of working conditions for writers and directors. It is fair to assume that in any negotiation that encompasses as many disparate issues as do the

guild agreements, the negotiators will agree to tradeoffs among the various negotiated items, with one side giving ground on some issues in exchange for concessions from the other side in other areas. The process of negotiation is thus likely to yield a complex pattern of results, most of which would have been different if the individual issue had been negotiated entirely separately from the others. Accordingly, plucking one term out of the contract is likely to yield a fairly arbitrary result.³⁸ Although at least one witness for SMC opined that these provisions reflect a reasonable valuation of the rights that are involved (Tr. 773, 784), this conclusory assertion was unsupported by any explanation of the basis for the proffered opinion, and is therefore unpersuasive. (Compare Fagan Dep. at 131-32.)³⁹

³⁸ The record contains no evidence as to either the genesis of the provision for the 1.2 percent residual rate, or the course of the negotiations that led to its inclusion in the two collective bargaining agreements. (See also Deposition of Harvey Finkel at 39 (SMC Exh. J-1)(residuals are just a fact of life under guild agreements and are not addressed in negotiations).)

³⁹ I assume for present purposes that the process of negotiating a collective bargaining agreement between the film-making industry and the guild is fairly analogous to the process by which supply and demand in a competitive market yield a pricing pattern. (E.g., Tr. 275.) It should be noted, however, that the evidence on this question is extremely thin, and several film industry witnesses testified that the studios sometimes use directors or writers not covered by the guild agreements. How frequently this occurs is not indicated in the present record. (See Deposition of Martin Shindler at 23 (ASCAP Exh. 27); see also Deposition of Patrick Joseph Dorsey at 32 (SMC Exh. J-2).)

The next step in the analysis by SMC, which involves a reduction by three-quarters in the payments contained in the guild agreements, is equally open to question, even though it is conceded that producers generally pay somewhat less up front for music than for directorial or scriptwriting services. (Tr. 269.) I summarize only some of the problems with SMC's approach.

First, because of great difficulties in obtaining sensitive cost information from the film studios, SMC apparently settled for a smaller and somewhat different database from what it originally sought. (E.g., Schindler Dep. at 21-22; Dorsey Dep. at 20-21; Deposition of Alida D. Camp at 9; Deposition of Christine M. Sims at 45.)⁴⁰ As an apparent result of the small sample size, the range of figures that one obtains by applying a 95 percent confidence interval to the various samples is so broad as to suggest little reliability in the median figures on which SMC relies. Second, and more important, there is no clear showing that the set of films ultimately included in the study are representative of the films shown on SMC (or cable television generally). (See also Finkel Dep. at 33.) This is of particular significance because the data reflects substantially different cost relationships from film to film and between film categories that are defined by intensity of music use. (See SMC Exhs. K & L; Schindler Dep. at 42; Finkel Dep.

⁴⁰ The depositions of Ms. Camp and Ms. Sims were received as SMC Exhs. J-3 and J-4, respectively.

at 31; Camp Dep. at 20-21.) As a consequence of this, it appears that the results obtained are highly sensitive to the mix of films included in the sample. Of particular concern is that SMC's heavy, and apparently arbitrary, reliance on only a handful of film studios -- which themselves seem to differ markedly in their relative spending on directorial and screenwriting services as compared to music services -- suggests a likely bias in the sample.⁴¹

In addition, the premise of this exercise is somewhat undercut by the data on "up front" payments. Although directors and screenwriters receive identical residuals from cable replays, their "up front" payments differ substantially, with writers receiving on average approximately one-third more than directors. (Tr. 701.) Indeed, SMC's economist conceded that his model was not necessarily an accurate reflection of the real world. (Tr. 661.)⁴²

Wholly apart from these technical concerns, SMC's invocation of the eight-cents-per-subscriber figure is conceptually flawed

⁴¹ When questioned about this potential bias, SMC's economist could shed no light on it other than to note that SMC's attorneys had assured him that they knew of no such bias. (Tr. 684.)

⁴² One possible explanation for variations between payments "up front" to music suppliers, on the one hand, and to directors and writers, on the other, is the fact that the latter are limited by collective bargaining agreements as to residual payments whereas the former are not. (See Schindler Dep. at 46-47; Dorsey Dep. at 54, 60-61.)

because it assumes that the licensee should pay only for the value of the music, rather than the value of the blanket license itself. As suggested in several earlier interim fee decisions, this is not the case. See e.g., In re Buffalo Broadcasting Co., Memorandum and Order at 22-26 (S.D.N.Y. Feb. 17, 1987); In re Buffalo Broadcasting Co., Memorandum and Order at 32-36 (S.D.N.Y. June 17, 1985).

Acquisition of a blanket license transfers to the licensee the right to unlimited use of ASCAP's repertory for a specified time period. Although this is more music than a license such as SMC could conceivably make use of during the license period, the blanket license has a major benefit for the licensee -- in conjunction with blanket licenses from the other performing rights societies, it ensures that the licensee need not attempt to locate the copyright owners of each composition included in its year-long programming and negotiate separately with each an acceptable fee. It represents, in effect, an insurance policy against copyright liability for the full range of the cable company's acquired programming. (E.g., Tr. 470, 579-80.)

This unique feature of the blanket license, which sets it apart from any other form of licensing -- whether direct licensing, source licensing, or a per-program license from the performing rights society -- was explicitly noted by the Supreme Court and Second Circuit in CBS and by the Second Circuit in Buffalo

Broadcasting. See BMI v. CBS, supra, 441 U.S. at 21-22; CBS v. ASCAP, supra, 620 F.2d at 939; Buffalo Broadcasting, Inc. v. ASCAP, supra, 744 F.2d at 927, 932; id. at 934 (Winter, J. concurring). The significance of this point for our analysis is somewhat different but nonetheless not wholly divorced from the analysis in those cases.

SMC is, for the most part, not the producer of programming, but rather the purchaser of previously produced programming.⁴³ It is therefore not purchasing music as such, but rather the right to exhibit the programming that it wishes to offer, including the music that the original producer has caused to be incorporated on the sound track.⁴⁴ Moreover, because of the apparent impracticality at this stage and in this industry of obtaining source or direct licensing for all programming except at greater cost than the blanket license, the cable supplier is deriving a significant benefit by purchasing the service of aggregation -- in

⁴³ Although SMC supplies some originally produced programs, the vast bulk of its programming consists of films and other programs that have been produced by others, who then sell SMC the right to arrange for their exhibition on cable television. (JPS at ¶ 11-14.)

⁴⁴ One of the trial witnesses noted that on occasion the music on the sound track of a film has been removed from the video cassette version and a separate set of music incorporated because of difficulties in obtaining clearance for use of the original music. (Tr. 733.) Whether this is generally feasible for cable program suppliers is not clear on the present record, but it is to be doubted since otherwise the program suppliers would presumably have done this to avoid the ASCAP blanket license. (See, e.g., Schlieff Dep. at 60.)

effect the avoidance of substantial cost and uncertainty that would be faced in the absence of an ASCAP blanket license.

Thus, if we are to talk of competitive pricing, we must start with the premise that the relevant market is one for aggregative performance licenses, not the market for the services of individual composers and musicians. Since SMC's method of valuation looks to payments by producers for the initial acquisition of music or other creative services, it does not fully reflect the benefits conveyed by a performing rights society blanket license to a cable programming service.

To measure the full value of the blanket license, we must account for not only the market value of acquisition of the music for particular programs but also the market value of the aggregative function of the license. In a hypothetical purely competitive market, this would presumably translate to the cost to the performing rights society and its members of providing the music and the aggregative feature plus whatever rate of return is necessary to justify the supplier remaining in that line of business. If, on the other hand, we posit a market characterized by a degree of competitiveness that does not fully match this

pristine state of affairs, the fees awarded would presumably be still higher.⁴⁵

There is no direct evidence in the record of the costs associated with the supplying of music rights in gross to the licensees. The record does reflect that ASCAP's administrative costs account for about 20 percent of its revenues generally (Tr. 19, 622-23), but there is no evidence in the record as to the relationship of expenses to revenues in connection with the blanket licenses offered to the cable companies. Moreover, as noted before, there is no reason to assume that a perfectly competitive market is the appropriate model for rate-setting here, and, in view of the wording of the Consent Decree as well as the policies embodied in the Copyright Act, there is some reason to conclude otherwise. In any event this analysis indicates that even if SMC's approach had sufficient statistical validity, its suggested result would have to be increased by some unstated amount to account for the nature of the services that are being provided under the blanket license.

⁴⁵ SMC argues that, if ASCAP did not offer a blanket license, the film producers or distributors might well provide source licensing and thereby actually save the cable programmers some money. (Tr. 565-71.) This may well be the case, but on the current record the actual costs (or savings) that would be realized without the blanket license are entirely speculative. (See, e.g., Tr. 768-69) (conceding that, without ASCAP and BMI, acquisition of performance rights might cost more.)

In sum, I conclude that the approach proffered by SMC does not yield a fully defensible result. Although it is at least suggestive of the fact that the rate urged by ASCAP is excessive under relevant standards, it cannot by itself provide a reliable measure of a reasonable rate.

D. A Reasonable Rate

The foregoing analysis suggests that neither the approach of ASCAP nor that of SMC to the formulation of a reasonable rate is wholly satisfactory. It is equally apparent that a "reasonableness" inquiry does not lend itself to the application of a clear and simple formulation and ultimately involves some conceded arbitrariness on the part of the rate setter. See Cirace, supra, 47 Ford. L. Rev. at 277 ("there is no economically meaningful method of determining a competitive price.").

It is not surprising that the drafters of the relevant decree provisions themselves eschewed finely focussed formulations and contented themselves -- both in the decree and in their presentations to the Court that approved it -- with such general criteria as the avoidance of "exorbitant" fees, and the imposition of a "reasonable" or "fair" rate. (See Joint Exhs. 44, 45). Indeed, this approach is foreshadowed in the line of cases that

apparently were the source of the reasonable rate provision; in those cases the courts have struggled to define the appropriate standard with some degree of concreteness and have generally conceded in the end that the determination of a "reasonable" fee for use of a product or service was a very impressionistic process. See, e.g., U.S. v. Hartford Empire Co., supra, 65 F. Supp. at 275-76.

On a more general level, the courts have been equally candid in noting the absence of any uniquely acceptable formula for either the setting of rates in regulated industries or the judicial review of rate-setting by the authorized administrative agencies. See, e.g., In re Permian Basin Area Rate Cases, 390 U.S. 747, 790-92 & n.59 (1968). See also Duquesne Light Co. v. Barasch, 109 S.Ct. 609, 616 (1989) (quoting, inter alia, Smyth v. Ames, 169 U.S. 466, 546 (1898)); Edgerton, "Value of the Service as a Factor in Rate Making," 32 Harv. L. Rev. 516, 540-46 (1919). As the Supreme Court recently noted in a related context: "The economic judgments required in rate proceedings are often hopelessly complex and do not admit of a single correct result." Duquesne Light Co. v. Barasch, supra, 109 S.Ct. at 619.⁴⁶

⁴⁶ Similar comments are found in Permian Basin concerning utility rate setting:

Economists have frequently proven more candid about these difficulties. Social welfare and public interest standards have been described as "almost unique in the extreme vagueness of [their] ultimate verbal norm."

In general terms the courts reviewing rate-making decisions have looked to whether those decisions have (1) compensated the producer or supplier for its costs, (2) provided a sufficient return on capital to compensate investors for their risk, and (3) ensured both financial integrity and further necessary investment, while at the same time (4) adequately protecting the legitimate interests of purchasers of those goods or services and any other cognizable public interests defined by the governing statutes. See, e.g., In Re Permian Basin Area Rate Cases, supra, 390 U.S. at 792.⁴⁷ Furthermore, to the extent that the suppliers' costs -- the most basic and, in many cases, most readily available data -- do not yield a precise result, it is at least arguable that the value of the product or service to the consumer may also be taken into account. See, e.g., Edgerton, supra, 32 Harv L. Rev. 516. See

Bonbright, supra, at 27. Similarly, it is said that no writer "whose views on public utility rates command respect purports to find a single yardstick by sole reference to which rates that are reasonable or socially desirable can be distinguished from rates that are unreasonable or adverse to the public interest." Id. at 67. But compare National Broadcasting Co. v. United States, 319 U.S. 190, 216, 63 S.Ct. 997, 1009, 87 L. Ed. 1344.

390 U.S. at 790 n.59.

⁴⁷ Of course, the specific criteria utilized by the rate setters in those cases will vary to some extent depending upon the specifics of the regulatory statute in question. See, e.g., Pennell v. City of San Jose, 108 S.Ct. 849, 857-58 (1988) (challenge to statutory provision authorizing consideration of hardship to tenant in setting residential rents.).

also Buffalo Broadcasting Co. v. ASCAP, supra, 744 F.2d at 926-27 (whether price of per-program license is "too costly" depends upon whether price "is higher than the value of the rights obtained").

This form of analysis cannot be literally applied to our case. There is no record reflecting the "cost" of music production as such, nor could there reasonably be since the principal information that seems relevant is the living expenses of the individual composer and such minimal overhead as he might incur in carrying out his composing activities, and this scarcely seems a reasonable basis for establishing a fee. In any event, the record contains no data on these matters. As for return on investment or encouragement of further investment, again this is not directly applicable here since we are not engaged in regulating the price of corporate production, and in any event there is no information in the record concerning what level of fees would be necessary to provide a continuing incentive for composers to compose. See generally Cirace, supra, 47 Ford. L. Rev. at 305.

In exploring alternative avenues we are left principally with the two forms of analysis proffered by the litigants, and an array of rates that might be derived depending upon the precise terms of that analysis. In assessing those alternatives, the general goal is to arrive at a rate that would not reward ASCAP for the exercise of any leverage that may be inconsistent with generally accepted

antitrust principles while still providing its members with a return for their labors that is generally commensurate with the value that a competitive market would place on both the musical fruits of those efforts and the benefits offered by the blanket license.

Since we have no free market in the rights conveyed by a blanket license, the principal data must perforce be specific negotiated agreements, although these results necessarily must be modified to the degree that they are believed to be influenced by considerations deemed inappropriate for our present analysis. For reasons already noted, the HBO and Disney results probably overstate the range of reasonable rates. Similarly, because SMC's analysis does not adequately account for the range of rights conveyed by the blanket license, it probably understates the range of appropriate rates even if one were to ignore the degree of random error and bias that appears to pervade the selection and use of the sample.

Between these two extremes, the most obvious alternative approach looks to an arguably comparable type of agreement -- the arrangements entered into by BMI with licensees such as SMC and others similarly situated. Such an analogy is based upon the fact that BMI provides a service comparable to that of ASCAP and thus,

in the absence of reliable direct indicia of a fair rate for ASCAP, can at least provide a useful benchmark for such a measurement.

Both sides offer arguments against direct reliance on the BMI agreements, although ASCAP's opposition is far more strongly pressed. SMC would view BMI as holding a monopoly power equivalent to that of ASCAP since the two organizations are functionally indistinguishable. Accordingly, it suggests, any agreement achieved by BMI with its licensees, even if significantly less remunerative than the ASCAP licenses, should be viewed as the product of coercive market power and thus an inappropriate measure of reasonable fees. In contrast ASCAP challenges the BMI rate as the product, in effect, of a "sweetheart" arrangement because BMI is an instrument of the broadcast industry and thus does not seriously defend its members' interests. ASCAP also argues that since HBO and Disney agreed to pay ASCAP far more than BMI, necessarily BMI's license must be deemed less valuable.

Neither view is persuasive. Although BMI performs a role equivalent to that of ASCAP -- indeed, that is the basis for looking to its agreements as a guide for an ASCAP fee -- it is not at all clear that it has or chooses to exert the type of leverage that SMC attributes to it. Indeed, even if we disregard entirely the alternatives to the blanket license that would-be licensees may potentially have with respect to both BMI and ASCAP,

it must be noted that BMI operates under a potential disadvantage compared to ASCAP in that it does not have a rate court to which it can repair to obtain a fee order; although it can sue unlicensed users for copyright infringement, this does not give it a means of prompt redress or ensure a continuing flow of revenue to its members, a fact that may encourage it to be more forthcoming in negotiations.⁴⁸ In any event, it appears to be the fact that in the past BMI has not negotiated as aggressively as ASCAP with the cable program suppliers. It may therefore be fairly inferred that the results of its dealings with those licensees reflect in effect a greater equality of negotiating leverage than do the ASCAP agreements. Under these circumstances BMI's agreements may provide guidance in assessing an appropriate rate for ASCAP since equality of bargaining power is likely to result in rates that are reasonable, even if not precise, measures of what a free market would yield. See, e.g., Sobel, supra, 3 Loyola Ent. L.J. at 39. But cf. Cirace, supra, 47 Ford. L. Rev. at 281-85 (discussing impact of bilateral monopoly on pricing).

As for ASCAP's argument that BMI's bona fides are suspect, it is not especially telling for two reasons. First, it is unsupported by any evidence other than the fact that BMI has agreed to lower rates than has ASCAP. Second, even if BMI is deliberately

⁴⁸ In contrast, ASCAP may seek interim fees under the consent decree pending the resolution of the final fee question, whether by negotiation or by litigation.

staying its own hand as an aid to its network founders, this does not change the ultimate conclusion; because BMI in practice does not appear to exert the same degree of bargaining leverage as ASCAP, the balance of power at the BMI bargaining table appears to be more equal than is the case with ASCAP, and hence the results of those negotiations may be significant for our purposes.

[Confidential material redacted.] This too suggests that BMI's agreed-upon rates have some probative weight for setting ASCAP fees.

The foregoing analysis indicates that the negotiated BMI rates for SMC and comparable licensees are a fair starting point for setting an ASCAP fee. The most recent agreements between BMI and both SMC and HBO involve payments of between \$0.12 and \$0.13 per subscriber. (See Joint Exh. 21; ASCAP Exh. E; Tr. 476-79.) The question remains, however, whether any adjustment is appropriate for purposes of setting a rate for ASCAP.

In valuing what is being offered, one may fairly note that the ASCAP license offers somewhat more than the BMI license in the narrow sense that it permits unlimited use of a repertory that is significantly larger, by a factor of approximately three. Although both licenses may, as a practical matter, be necessary, the cost of foregoing the blanket license of ASCAP is likely to be higher

since SMC apparently uses more ASCAP music (Tr. 84-91; ASCAP Exh. 4)⁴⁹ and therefore it is probable that more of SMC's programs contain ASCAP music than contain BMI music.⁵⁰ Thus the alternatives of either foregoing programming containing ASCAP music or seeking other forms of licensing for such programs would likely be more costly to the licensee than would the equivalent steps in lieu of a BMI license. In short, the ASCAP blanket license may be viewed as conveying somewhat more value to the licensee than does the BMI license.

Under these circumstances, some differential between the BMI and ASCAP rates is reasonable. See Edgerton, supra, 32 Harv. L. Rev. at 556 (where pricing on cost basis yields a range of possible rates, the benefit to the purchaser can be used to influence where the price is set within that range). See also Buffalo Broadcasting Co. v. ASCAP, supra, 744 F.2d at 926-27 (discussing comparison of price and value received). As for the size of the differential, [confidential material redacted].

⁴⁹ ASCAP's data on this issue -- suggesting that approximately two-thirds of the music on SMC is ASCAP music -- is subject to methodological question. (Tr. 144-53.) Nonetheless, even if we disregard the ASCAP estimate, it is fair to infer that ASCAP music is more frequently used in view of the disparity in the respective repertoires.

⁵⁰ Some programs undoubtedly contain music from both societies.

[Confidential material redacted.] (See Joint Exh. 42.)

Applying the same ratio to a \$0.12 per subscriber figure (see ASCAP Exh. E; Tr. 476-79), we arrive at an adjusted rate of approximately \$0.15 per subscriber.⁵¹

In sum, the annual fee for SMC's blanket license from ASCAP for the period from April 4, 1984 to December 31, 1988 is set at \$0.15 for each subscriber to the cable services provided by SMC.⁵²

⁵¹ This figure seems supportable not only by reference to the BMI agreements with HBO and with ASCAP, but also, in general terms, by reference to the admissible data proffered by both sides in support of their respective positions. As noted, the most recent HBO license agreement appears to reflect in some part not only a degree of inequality in bargaining leverage between ASCAP and HBO, but also some implicit value in the "most favored nation" provision, as well as possibly some erroneous expectations by HBO concerning future financial prospects. If each of these considerations were assigned some value, even if concededly arbitrary, and if the \$0.25-per-subscriber figure were reduced accordingly, it is reasonable to expect that the resultant figure would not be too far off the \$0.15 fee arrived at here.

As for SMC's analysis, if one chose a ratio of 1:3 rather than 1:4 between the cost of music acquisition and the costs of directorial or screenwriting services, and then added, again somewhat arbitrarily, a thirty-percent increment for the aggregative feature of the blanket license, the resulting figure would be quite close to \$0.15 per subscriber.

⁵² Both parties have addressed the blanket fee question solely in terms of a "per subscriber" formula, and accordingly I have done so as well. This approach is not necessarily the only defensible one either in this case or in the case of any other licensee, and both ASCAP and other applicants will of course be free in other proceedings to argue for different formulations.

II. The Per Program License Issue

At some point in the course of negotiations between the parties, ASCAP took the position that SMC was not entitled to a per-program license and apparently declined at that stage to quote any fee for such a license. (Tr. 117, 120.) At no time until the trial did SMC seek judicial relief from this refusal to quote a per-program fee, apparently because it was intent upon achieving a satisfactory blanket license agreement.

As part of its contentions enumerated in the joint pre-trial statement, SMC asserted that it is entitled to a per-program license on demand, and it therefore requested an order requiring ASCAP to quote a rate. (JPS at ¶¶ 120-23). Although SMC appeared alternatively in its portion of the Joint Pretrial Statement and its post-trial Memorandum to request that this Court impose a fee, it offered no evidence at trial relevant to such a determination.

In response ASCAP urges that SMC should be barred from obtaining court intervention either because it has shown no real interest in such a license in the course of negotiations or because the Consent Decree does not entitle it to such a license. Alternatively ASCAP asserts, and has proffered testimony, that it has been and remains willing to negotiate a per-program fee for SMC. (See Tr. 822-24.)

ASCAP's interpretation of the Decree rests upon its reading of Article VII(B), which directs it, in effect, to issue per-program licenses on written request by "any unlicensed radio or television broadcaster. . . ." According to ASCAP, SMC is not a television "broadcaster" within the meaning of the decree. In support of this reading ASCAP offers principally a laundry list of perceived technological and economic differences between a cable television program supplier, such as SMC, and over-the-air television stations or networks, which are concededly covered by this provision. SMC of course argues the contrary.

As a technical matter, since SMC has requested of ASCAP a fee quote for a per-program license and ASCAP has declined to give one, there is jurisdiction in this Court to adjudicate the issue of SMC's entitlement to such a license.⁵³ Nonetheless, since the record reflects without contradiction that ASCAP is prepared to negotiate a fee for such a license, it does not appear at this stage that we face a live controversy requiring a definitive

⁵³ In the present circumstances I do not view SMC's delay in raising this issue in court as tantamount to a waiver. My conclusion in this regard is heavily influenced by the fact that the Decree contains no time limits and the courts have imposed none for invoking judicial intervention. In the future, however, licensees under the Decree will be expected to act with reasonable dispatch in seeking court relief once negotiations have foundered, particularly if delay may cause either prejudice to ASCAP or otherwise avoidable prolongation of judicial proceedings. The latter is surely the case in this instance since SMC's delay could require future litigation of the per-program issues after trial of the blanket license fee question.

interpretation of the disputed provision. Although SMC appears now also to be seeking an order setting an appropriate fee, this can scarcely be done on the current record. Moreover, in view of the evident priority that the Consent Decree gives to the negotiation of fees by the parties, see, e.g., United States v. ASCAP, supra, 586 F. Supp. at 730-31; In re Home Box Office, Inc., Memorandum and Order at 18 (S.D.N.Y. July 11, 1986), it is appropriate in the present circumstances to give the parties an opportunity to arrive at an agreed-upon figure if SMC wishes to pursue the matter.

Rather than adjudicate the abstract issue of entitlement or attempt to set a fee in a vacuum, the Court will simply direct that ASCAP quote a per-program fee to SMC within seven (7) days, and undertake good-faith negotiations with SMC concerning the terms of such a license. If, within twenty one (21) days after ASCAP proposes a fee, the parties have been unable to reach an agreement, either may come to the Court to seek appropriate relief.⁵⁴

⁵⁴ The Consent Decree provides for a sixty (60) day interval. Since, however, it is conceded that at an earlier time ASCAP refused to quote a fee, this provision is not directly applicable and the Court may shorten the time period in question. That is certainly appropriate here since we are dealing with a licensing period that ended more than nine months ago.

CONCLUSION

For the reasons stated, the Court determines that a "reasonable fee" for a blanket license for SMC for the period from April 4, 1984 through December 31, 1988 shall be set at \$0.15 per subscriber to the SMC services during the relevant period. The fee payable should be computed monthly to conform to the records of SMC reflecting the number of SMC subscribers.

With respect to SMC's application for a per-program license, the Court directs that ASCAP transmit a proposal for such a license fee to SMC within seven (7) days and undertake good-faith negotiations with SMC concerning the terms of such a license for a period of twenty-one (21) days. This directive is based upon ASCAP's representation of willingness to negotiate such a license with SMC and is without prejudice to its position that the Consent Decree does not compel it to issue a per-program license to SMC. If the parties cannot reach agreement within the specified time period, either party may seek appropriate judicial relief.

DATED: New York, New York
October 12, 1989

SO ORDERED.

MICHAEL H. DOLINGER
UNITED STATES MAGISTRATE

Copies of the foregoing Redacted Memorandum and Order have been transmitted this date to:

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Country Music Television Rates -
Percentage of Net Revenues

	<u>BMI</u>	<u>ASCAP</u>
	1%	0.7%
	<hr/>	<hr/>
Ratio:	59%	41%

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK



**REDACTED
MEMORANDUM AND
ORDER**

UNITED STATES OF AMERICA,

Plaintiff,

-against-

AMERICAN SOCIETY OF COMPOSERS,
AUTHORS AND PUBLISHERS,

Defendants.

In The Matter of the Application of
TURNER BROADCASTING SYSTEM, INC.,

Applicant.

For The Determination of Reasonable
License Fees.

In the Matter of the Applications of
USA NETWORK, LIFETIME TELEVISION,
THE DISCOVERY CHANNEL, THE CBN
FAMILY CHANNEL, BLACK ENTERTAINMENT
TELEVISION, INC., ARTS & ENTERTAINMENT
CABLE NETWORK, THE DISNEY CHANNEL,
HOME BOX OFFICE, INC., SHOWTIME
NETWORKS INC., MTV NETWORKS, INC.,
OPRYLAND USA, INC., PLAYBOY VIDEO
ENTERTAINMENT GROUP, INC., AMERICAN
MOVIE CLASSICS COMPANY, SPORTSCHANNEL
PRISM ASSOCIATES, BRAVO COMPANY and
COUNTRY MUSIC TELEVISION, INC.,

Applicants.

For Licenses for their Cable Program
Services.

MICHAEL H. DOLINGER
UNITED STATES MAGISTRATE:

This proceeding was initiated by the Turner Broadcasting
System, Inc. principally to obtain a judicial interpretation of one

provision of the Consent Decree under which the American Society of Composers, Authors and Publishers ("ASCAP") licenses the public performance rights to the music of its members. Specifically, Turner and a number of other cable television program suppliers that have joined in this proceeding contend that Article V(A) of the Decree entitles them to a license that covers the actual performance of their programs by cable system operators.¹ ASCAP has declined to offer them such a license or to quote a fee for it, contending that, as cable program suppliers, they do not qualify as a "telecasting network" within the meaning of Article V(A). Accordingly, ASCAP asserts that the license to which they are entitled, and for which it has offered to negotiate a fee, covers only their use of the music, and not its actual performance by the

¹ Article V states in relevant part:

Defendant ASCAP is hereby ordered and directed to issue, upon request, licenses for rights of public performance of compositions in the ASCAP repertory. . .

(A) To a . . . telecasting network. . . on terms which authorize the simultaneous and so-called "delayed" performance by . . . telecasting. . . of the ASCAP repertory by any, some or all of the stations in the United States affiliated with such. . . television network. . . and do not require a separate license for each station . . . for such performances. . . .

United States v. ASCAP, 1950-51 CCH Trade Cases ¶ 62,595 at 63752 (S.D.N.Y. March 14, 1950).

system operators, from which ASCAP would seek a separate license agreement and, presumably, an additional fee. That issue is now the subject of a motion for summary judgment by ASCAP and it will be addressed by a separate decision.

Following commencement of this proceeding, ASCAP applied to this Court under Article IX(B) of the Decree for the setting of interim fees to be paid by the applicants during the pendency of this litigation. Turner and the other program suppliers oppose any award of interim fees, arguing that since ASCAP has declined to quote or negotiate a fee for the broader gauged license that they seek, it is not entitled at this stage to court intervention. Alternatively they urge that if the Court were to set such fees, they should be at far lower levels than those proposed by ASCAP. It is to this dispute that I now turn.

ANALYSIS

A. The Prematurity Issue

The Consent Decree defines a simple procedure for the acquisition of a public performance license for ASCAP's repertory. Under Article VI, ASCAP must issue a license covering its entire repertory "to any user making written application. . . ." Once the written application is received, ASCAP is required to "advise the

applicant in writing of the fee which it deems reasonable for the license requested." (Article IX(A).) The parties are required in the first instance to undertake negotiations to attempt to agree upon an appropriate fee, but if no agreement is reached within sixty days, then the applicant may seek a ruling from the Court setting a reasonable fee for the license in question.

The key provision for present purposes is Article IX(B), which provides that

When an applicant has the right to perform any composition in the ASCAP repertory pending the completion of any negotiations or proceedings provided for in Subsection (A) hereof, either the applicant or ASCAP may apply to this Court to fix an interim fee pending final determination of what constitutes a reasonable fee. If the Court fixes such interim fee, ASCAP shall then issue and the applicant shall accept a license providing for the payment of a fee at such interim rate from the date of the filing of such application for interim fee.

This provision also states that if the Court ultimately sets a "reasonable fee" for the license under Article IX(A), it is to "be retroactive to the date the applicant acquired the right to use any, some or all of the compositions in the ASCAP repertory pursuant to the provisions of this section IX."

The various applicants in this proceeding argue that ASCAP is obligated to quote a fee for the type of license that they have requested -- that is, a blanket license that covers both them and

the cable system operators -- and that until ASCAP does so, it is barred from seeking an interim fee award. This argument cannot be sustained in view of the relevant terms of the Consent Decree.

The net effect of Articles VI and IX is that an interested party obtains the right to the use of ASCAP music by virtue of its written request to ASCAP for a particular form of license. See, e.g., United States v. ASCAP (In re Showtime/The Movie Channel, Inc.), Memorandum and Order at 9-10 (S.D.N.Y. July 8, 1986). Whether or not ASCAP actually issues a written license or quotes a fee for a license of the type requested by the applicant does not affect the entitlement of the applicant to use ASCAP music. Indeed, the Decree contemplates that the fee for the license may well not be established for a considerable period of time while the parties either negotiate or litigate the issue.

The interim fee provision plainly was included in the Consent Decree because the contemplated sequence of events in the licensing process involves an anticipated delay between the vesting of a public performance right in the applicant and the setting of a fee for such use. See, e.g., United States v. ASCAP (In re American Broadcasting Companies, Inc.), Opinion at 9 (S.D.N.Y. May 26, 1982); United States v. ASCAP (In re Showtime/The Movie Channel, Inc.), Memorandum and Order at 7 (S.D.N.Y. October 10, 1984); United States v. ASCAP (In re Showtime/The Movie Channel, Inc.), Memorandum and Order at 6 (S.D.N.Y. January 14, 1985). Not

surprisingly, then, Article IX(B) entitles ASCAP to seek an interim fee from the Court as soon as "an applicant has the right to perform any composition in the ASCAP repertory. . ." and further underscores this point by describing the "right" in question as a right to perform the music "pending the completion of any negotiations or proceedings provided for in Subsection (A)."

Contrary to the argument of Turner and the other applicants, Article IX(B) does not predicate ASCAP's entitlement to interim fees on its having quoted a rate to the applicant but rather on the applicant having the right to perform music from the ASCAP repertory. There is no dispute here that Turner et al. have requested licenses and that by those requests they now have the right to perform the music found in ASCAP's repertory; indeed, they are currently exercising that right. Accordingly, as the language of Article IX(B) makes evident, ASCAP is entitled to seek an interim fee award from the Court while the parties' disputes over the terms of that license, including its scope, are resolved either by litigation or by negotiation.

In arguing the contrary, the applicants could be viewed as asserting that since ASCAP has disputed their right to a license covering the system operators, there is a question as to their entitlement to "perform" ASCAP's music and hence the prerequisite for an interim fee application under Article IX(B) has not been satisfied. The short answer to this argument is that Article IX(B)

is triggered when "the applicant" has the right to "perform" the music, and the applicants here plainly have that right by virtue of their request for a license. The somewhat longer answer is that, irrespective of whether ASCAP has complied with its obligation under Article V to issue licenses to "telecasting" networks that cover their affiliated stations, it is plain that both the applicants here and the system operators are performing ASCAP music under the assumption that they are entitled to do so under the Consent Decree and that ASCAP does not dispute this assumption²; all that is in question is whether ASCAP can demand that the system operators separately agree to pay ASCAP for the performance rights to music incorporated in the programs provided by the applicants. The Court will ultimately resolve that issue -- absent an intervening settlement -- and in the meantime there is no basis, either in the text of the Decree or in some policy implicit in it, to deprive ASCAP of current compensation for the current use of its repertory.³

² ASCAP reports that it has agreed with the system operators to undertake negotiations for separate licenses for this interim period if the Court adopts ASCAP's view of the current dispute. (See Reply Affidavit of Bernard Korman, Esq., sworn to Aug. 3, 1989, at ¶¶ 3-6 & Exh. A.)

³ As will be seen in the discussion of fee amounts, the parties are in some dispute as to how the interim fees should be measured in light of the dispute over the proper scope of the license. The applicants urge that they should not be required, even on an interim basis, to pay for the value of a broad license if all they receive is the narrower license. ASCAP simply argues that the issue of the scope of the license need not be resolved in the context of the interim fee dispute.

B. Measurement of Interim Fees

The purpose of the interim fee award is to ensure a continued flow of revenue to the copyright holders during the period when the applicant holds the right to perform their music but no final fee has been established. Accordingly the Court has recognized in prior fee proceedings that if the parties have had a meaningful agreement in the immediate past reflecting payments for comparable rights, the Court would look to such agreements as generally reliable guides for the setting of an interim fee; in effect, the maintenance of some version of the status quo would be viewed as the most appropriate temporary arrangement, subject, of course, to a showing by either side of why the prior arrangement should not govern. In the absence of any prior history of agreements between the parties, or if some aspect of those prior deals casts doubt upon their appropriateness as guides for the present, the Court would look to license agreements reached by other licensees or licensors that could be viewed as similarly situated. In all events, the underlying assumption for this exercise would be the same as governs the setting of a final fee, that the role of the rate court was to ensure a fee that was not excessive according to relevant criteria. The difference is that the interim-fee-setting process would be much less exacting in view of the need for expedition in deciding the application, the more limited

evidentiary record, and the fact that the interim fee would be subject to retroactive modification upon the determination of a final fee. See, e.g., United States v. ASCAP (In re Showtime/The Movie Channel Inc.), Memorandum and Order at 7-9 (S.D.N.Y. January 14, 1985); United States v. ASCAP (In re Buffalo Broadcasting Inc.), Memorandum and Order at 19 (S.D.N.Y. June 17, 1985).

Bearing these general standards in mind, I address seriatim ASCAP's applications with respect to the pay cable program suppliers and the basic cable program suppliers.

1. The Pay Cable Program Suppliers

The pay cable program suppliers share a common role in the cable television industry. Each enters into agreements with cable system operators under which the operator is authorized to market the cable company's program service to customers who acquire the cable operator's basic service. The customer pays a premium to the system operator for the additional programming, which is accessible on a separate channel, and the system operator in turn pays a portion of the premium to the program supplier.

In view of the common role of these applicants, it is reasonable to infer that they should be treated comparably, at least for interim fee purposes, absent a strong showing to the

contrary. Since no such showing has been attempted, I apply similar standards to them.

The most readily determinable fee is that of Showtime/The Movie Channel. It applied for a three-year license for its services on December 30, 1988, and ASCAP filed an interim fee application on January 4, 1989. (Affidavit of Bernard Korman, Esq., sworn to June 10, 1989, at ¶ 3.) Although ASCAP and SMC do not have a meaningful history of prior agreements -- the last negotiated licenses involved SMC's corporate predecessors and expired at the end of 1979 -- we have the benefit of a litigated fee application for the period immediately preceding the time frame at issue on the current application, and the Court has awarded a final fee of \$0.15 per subscriber for SMC's use of ASCAP music under a blanket license. There is no reason not to apply the same rate to the 1989-91 period, and indeed both ASCAP and SMC have represented their willingness to accept the prior fee award as an appropriate measure of a current interim fee.⁴

The only complication in this matter is that SMC argues that it should not be required to pay a fee as defined by prior license terms unless the current license is equally broad in scope -- that

⁴ ASCAP correctly notes that the prior interim fee should be updated on the basis of the SMC final fee determination. SMC has not openly quarrelled with this point, nor could it reasonably do so. Accordingly there is no need to address the parties' dispute concerning whether the old interim rate -- \$90,000.00 per month -- should be translated into a per-subscriber figure.

is, unless it covers the system operators who carry SMC's programming. In effect, that result is assured here because ASCAP has agreed to treat the system operators as licensed during the interim period and not to seek payment from them, at least on an interim fee basis, for the programming that the services are supplying. (See Korman Reply Affidavit at ¶¶ 4-6.) If the Court ultimately upholds ASCAP's interpretation of the Consent Decree, then ASCAP will of course be free to seek fees from the systems operators, but it concedes that in such a case the program suppliers would be entitled to an immediate retroactive reduction of their fee payments. (Id. at ¶ 3.) In short, for interim fee purposes SMC is receiving the protection to which it is entitled as the price for paying on the same basis as applies to the prior licensing period.

Home Box Office, Inc. applied on November 21, 1988 for a three-year license for the period 1989-91 and ASCAP moved for an interim fee on December 28, 1988. (Korman Aff. at ¶ 3.) For reasons discussed at some length in the SMC decision, HBO is quite comparable to SMC. Indeed, they are the two largest pay cable program suppliers and compete vigorously for the same audience, while featuring very similar types of programming on their various services. I note as well that in 1986 the Court imposed an interim fee of \$0.13 per subscriber for the period ending December 31, 1988, based on a similar interim fee established earlier by the

Court for SMC. (See United States v. ASCAP (In re Home Box Office, Inc.), Memorandum and Order at 24 (S.D.N.Y. July 11, 1986).)

Under the circumstances, there is no reason why HBO should not pay, on an interim fee basis, the same rate as applies to SMC for this and the immediately preceding period. Accordingly the interim for HBO is \$0.15 per subscriber.

The Disney Channel applied on November 3, 1988 for a license for an unspecified period to run from January 1, 1989. (Korman Aff. at ¶ 3.) Disney is a newer entrant in this field than SMC or HBO, but apparently operates in a similar manner. Since 1986, it has paid to ASCAP, on an interim fee basis, an agreed-upon fee of \$0.13 per subscriber, apparently based on the SMC and HBO interim fees imposed by this Court.

As with HBO, no evidence has been offered to suggest that for interim fee purposes, Disney should to be treated differently from SMC. Accordingly the interim fee from Disney will be \$0.15 per subscriber.

The Playboy Video Entertainment Group applied for a license on February 3, 1989. It seeks coverage commencing March 3, 1989 for an unstated period. On February 7, 1989 ASCAP sought an award of interim fees. (Korman Aff. at ¶ 3.)

In the absence of any prior fee agreement between Playboy and ASCAP, Playboy agrees that the SMC fee should govern. Since the SMC fee is now \$0.15 per subscriber, that rate should apply to Playboy as well.

The three remaining pay cable program services are SportsChannel/Prism Associates, Bravo Company and American Movie Classics Company. All applied for ASCAP licenses on February 9, 1989, Bravo and American Movie for a five-year period and SportsChannel for an unstated length of time, all to commence on February 9, 1989. ASCAP has applied for interim fees as of March 6, 1989 from SportsChannel and American Movie, and as of March 8, 1989 for Bravo. (Korman Aff. at ¶ 3.)

By letter to the Court from their Vice President, Legal and Business Affairs, Hank J. Ratner, Esq., these three companies assert that they adopt the arguments advanced by applicants "USA Network, et al." and claim that those arguments indicate that the appropriate interim fee for these three companies should be 0.3 percent of gross revenues.

These companies have, in part, misread the brief that they purport to invoke. The arguments to which they apparently refer concern the appropriate fee for basic cable applicants, not pay cable applicants. (See Memorandum of USA Networks at 24 et seq.) The analysis that led to the 0.3 percent figure need not be

described at length at this point but involves, in effect, a reduction from fees agreed to by two basic cable entities -- MTV Networks and The Nashville Network ("TNN") services -- based on the fact that the other basic cable companies use far less music in their programming. (See id. at 24-26.) In lieu of the MTV-TNN analogy, USA et al. argued that the appropriate benchmark for basic cable companies that feature general entertainment programming is the pay cable program suppliers, such as SMC and HBO, since they offer similar programming. Since, however, the fees for those companies recently have been defined on a "per subscriber" basis and since the basic cable companies do not have a separate set of subscribers, "USA et al." proposed converting the prior SMC interim fee -- \$0.13 per subscriber -- into a percentage-of-revenue formula. Since the old SMC fee apparently represented approximately 0.3 percent of SMC's gross revenues, the basic cable companies suggested that they should pay at that rate.

As noted, American Movie Classics, Bravo and SportsChannel/Prism are pay services and accordingly do have their own subscribers. Accordingly there is no reason to shift the fee to a gross revenue formula. Since there is no dispute that SMC's fee level forms the appropriate baseline for these services, each is to pay interim fees in the amount of \$0.15 per subscriber.

2. The Basic Cable Services

The basic cable services differ from the pay cable suppliers in that they supply programming to the system operator for inclusion in the operator's basic package of cable transmissions. The customer does not pay a separate fee for those channels, and revenues are derived from a combination of customer payments to the system operator and advertising fees.

The only prior agreements between ASCAP and the basic cable companies, other than early experimental licenses, involved MTV Network and TNN. In 1987 Viacom agreed to pay a total of [confidential material redacted] for a license for its three services -- MTV, VH1 and Nickelodeon -- covering the years 1984 through 1988. (Korman Aff. at ¶ 12.) As for TNN, its programming was licensed at a fee of [confidential material redacted] for the period March 7, 1983 through December 31, 1988. (Korman Aff. at ¶ 13.)

According to ASCAP, each of these agreements involved payments that amounted to approximately 0.7 percent of the cable services' actual or projected revenues for the license period. Based on these agreements, ASCAP now seeks from the ten applicant basic cable services an interim fee in the amount of 0.7 percent of gross revenues.

MTV and TNN concur that their prior agreements should be extended for them but dispute ASCAP's conversion of those rates into a percentage-of-revenue formula.⁵ Most of the other basic cable services object to reliance on the MTV and TNN agreements because those services rely heavily on musical programs whereas the other services feature either a range of general entertainment or news programming. Accordingly, they all argue for substantially lower fees than suggested by ASCAP, most advancing a formula of 0.3 percent of gross revenues. I address each service in turn.

Since MTV agrees that its most recent contract with ASCAP is the appropriate measure of a current interim fee, the only substantial question is whether the fee should simply continue the same level of payments, which amounted to [confidential material redacted] per annum over the life of the agreement, or else be converted into a percentage-of-revenue formula.

There is little doubt that in weighing the appropriateness of the proposal for a license agreement in 1987, both MTV and ASCAP took into consideration the relationship between the proposed flat fee and MTV's revenues, and presumably both found it acceptable. Nonetheless, there is no compelling reason for declining to extend the prior fee agreement, as written, which calls simply for a

⁵ They also dispute ASCAP's calculation that payments under the prior agreement amounted to .7 percent of gross revenues.

specified sum certain to be paid for a given period of music use.⁶ Since that sum translates into [confidential material redacted] per annum, the interim fee for MTV will be set at that level.

As for TNN, the same analysis applies. Accordingly the interim fee for TNN is set at [confidential material redacted] per annum.

With respect to the rest of the basic cable services, the central dispute differs. None of them has previously entered into any meaningful license agreements with ASCAP. Accordingly, the parties all seek to press their own versions of comparable agreements with other licensees, ASCAP pointing to MTV and TNN and most of the services pointing to SMC and HBO.⁷ The effective difference in these two approaches is that ASCAP's would yield approximately 0.7 percent of revenues whereas the cable services'

⁶ As ASCAP notes, this dispute is simply about money; since MTV's revenues have increased, ASCAP prefers to alter the prior fee into a percentage-of-revenue formula and MTV prefers not to do so. There is no pressing reason, however, to adopt a percentage-of-revenue approach. See, e.g., United States v. ASCAP (In re Buffalo Broadcasting, Inc.), Memorandum and Order at 18-20 (S.D.N.Y. February 17, 1987) (adopting flat fee instead of percentage-of-revenue formula). In any event, since this is merely an interim fee award, if the figures represented by the 1987 agreement are seriously out of date, ASCAP will have an opportunity to prove that fact.

⁷ The "percentage of revenue" issue is not in dispute; the services concede that such a formula is appropriate for them since the only way in which SMC's fee can be applied to a basic cable service is by translation into a percentage-of-revenue formula.

would result in a fee of about 0.3 percent.⁸ Two of the Turner services offer a somewhat different analysis and urge fees for them that are calculated as flat sums totalling less than \$100,000.00.

ASCAP correctly notes that, as basic cable services, these companies have a somewhat different relationship with the cable operators than do the pay cable services. Specifically, their services are derived from advertising as well as a share of the fees paid to the system operators by customers who purchase the basic cable service; in contrast, the pay cable services derive all of their revenues from the operators, who market their programming as separate services for which the customer must pay an additional fee.

The obvious question, however, is whether and why these differences demonstrate that the two categories of licensees should pay substantially different fees. ASCAP fails to make this showing.

All of these companies are in essentially the same business -- supplying programs to be aired on cable television. Whether the source of their revenues for these programs is from advertising

⁸ The 0.3 percent figure is based on an interim SMC fee of \$0.13 per subscriber. Although the SMC final fee has now been set at \$0.15 per subscriber, this does not effect a significant change in the resultant "percentage of revenue" figure. Accordingly, for interim fee purposes I adhere to a 0.3 percent fee for the relevant basic cable program suppliers.

or viewers' payments, and whether the viewers' payments are made separately for the particular suppliers' programming or as part of a lump sum for the basic cable package, does not appear to be significant for purposes of pricing ASCAP's blanket license.

It may fairly be argued that while these distinctions appear, in truth, to be distinctions without a difference for our purposes, the extent of a licensee's use of music is at least potentially a relevant consideration.⁹ As suggested by the Second Circuit in Buffalo Broadcasting Co. v. ASCAP, 744 F.2d 917, 926 & n.8 (2d Cir. 1984), cert. denied, 469 U.S. 1211 (1985), one element of the analysis of what constitutes a reasonable fee may be the benefit of the license to the user, and that is plainly a function of the extent of the licensor's music use. See also Edgerton, "Value of the Service as a Factor in Rate Making", 32 Harv. L. Rev. 516, 554-56 (1919). Somewhat differently stated, we may view the hypothetical market price of the blanket license as being governed, at least in part, by the cost of alternative arrangements, whether in the form of direct or source licensing or per-program licensing or the avoidance of programs utilizing ASCAP music. See Buffalo Broadcasting Inc. v. ASCAP, supra, 744 F.2d at 934 (Winter, J., concurring). The more music that a licensee uses in its programming, the more expensive, as a general rule, would be these alternatives to the blanket license; a more intensive user of music

⁹ ASCAP relied heavily on this assumption in applying to the Court for an interim fee from MTV in 1986. Ultimately that dispute was settled by the parties.

(and presumably therefore of ASCAP music) would have to locate and negotiate with more copyright holders if it opts for direct licensing, would have to persuade more syndicators or distributors to obtain and provide music rights for their programming if it opts for source licensing, would have to pay more if it chooses a per-program license, and would have to forego more programming if it decides simply not to broadcast programs containing ASCAP music. Necessarily, then, insofar as the price of a blanket license is set by competition between that form of license and its alternatives, the blanket license price will tend to be set higher if the competing alternatives are more expensive.¹⁰

The implication of this analysis is that the basic cable services may indeed have more in common with SMC than with MTV or TNN, both of which apparently rely far more heavily on musical programming, that is, substantial amounts of featured music. Although ASCAP raises very tentative questions about the relative reliance of all of these cable services on intensive music use,

¹⁰ ASCAP also argues that the basic cable services receive the same benefit from the blanket license regardless of how much music they use --- that is, they have unlimited access to all of ASCAP's repertory. Although this is unquestionably true as a legal matter, plainly the economic benefit to each licensee depends upon that licensee's particular circumstances. In any event, ASCAP's argument can equally be cited in support of the proposition that the fee for all of the basic cable companies should follow that imposed on SMC -- as most of the basic cable companies argue -- since the legal benefits to them of the blanket license are the same as those offered by the blanket license to SMC. Since ASCAP concedes that SMC should pay, in effect, a little more than 0.3 percent of its gross revenues, it could fairly be argued that the basic cable companies should not pay any more.

that issue is more appropriately addressed in connection with the setting of final fees. At present the evidence in the record indicates that MTV and TNN both utilize substantial musical programming and that the other cable companies use significantly less music, relying instead principally on a range of general entertainment programming that more closely resembles the programming found on SMC and similar pay cable services. Given that evidence, for interim fee purposes it is appropriate to impose a fee comparable to that set for SMC. Since that fee is defined on a per-subscriber basis and since the basic cable companies do not have a comparable set of subscribers for their services, the fee must be defined in terms of percentage of gross revenue.

The \$0.15 per subscriber fee payable by SMC for the period April 4, 1984 through December 31, 1988 amounts to approximately 0.3 percent of its gross revenues for that period.¹¹ The same fee will be paid by USA Network, Lifetime Television, The Discovery Channel, The CBN Family Channel, Black Entertainment Television, Arts and Entertainment Cable Network, and Turner Network Television (TNT).

There are three remaining basic cable companies. Country Music applied on May 2, 1989 for a license to commence as of January 1, 1989, and ASCAP applied for an interim fee award on May 9, 1989. (Korman Aff. at ¶ 3.) Country Music has not responded

¹¹ See p. 18 n.8, supra.

to ASCAP's interim fee motion and accordingly it has waived any objection to ASCAP's fee request. In any event, in the absence of any evidence to the contrary, I infer that it is an intensive user of music -- an inference supported, if nothing else, by its name -- and accordingly conclude that a percentage-of-revenue formula based on the prior MTV agreement is appropriate. The fee for its license is therefore set at 0.7 percent of its gross revenues.

The final issue concerns the fee for CNN and Headline News, Turner's two news services. Turner seeks to pay only \$50,000.00 for each, principally because they have apparently obtained direct licensing for most of the music that they use and hence the blanket license is needed only for incidental music. Turner's papers do not, however, indicate how much music these services use, how much of that music is not subject to direct licensing, and how these services' music use compares to that of the other basic cable suppliers. (See Affidavit of Charles Shultz, sworn to in July 1989, at ¶¶ 5-6.)

The fact that Turner has undertaken direct licensing does not necessarily mean that the price of the blanket license should therefore be reduced. The blanket license is one of a number of alternatives available to the performer of music, and in a competitive market its price will presumably be affected by the price of the competitive alternatives. See pp. 19-20, supra. The fact, however, that a consumer has opted for another alternative

does not in itself demonstrate that the price of a blanket license to the consumer must be reduced. Indeed, if anything, the fact that Turner has utilized direct licensing for most of its music needs suggests that it may be an appropriate candidate for a per-program license, which is generally viewed as the alternative for bridging the gaps in a music performer's direct or source licensing of its programming.

Whether Turner's efforts at direct licensing should affect the price of a blanket license, and whether Turner is entitled to a per-program license under the decree¹² are matters that can be addressed in the final fee proceeding, or perhaps in negotiations between the parties. It suffices, for present purposes, to conclude that Turner has not yet demonstrated why it should pay less for a blanket license than other basic cable program suppliers whose programming involves general entertainment shows without any special focus on music.¹³ Accordingly the fee for a blanket license for CNN and Headline News is set, on an interim basis, at 0.3 percent of gross revenue.

¹² I note that this issue was raised, although not definitely resolved, in the SMC proceeding.

¹³ As noted, although Turner represents that "any use of ASCAP-licensed music in our two news program services is purely incidental to the services' ordinary news reporting. . ." (Shultz Aff. at ¶ 6), it does not indicate how much music this involves and necessarily does not indicate how that music use compares to the general programming of the other applicants.

CONCLUSION

The following interim fees are imposed:

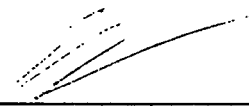
<u>Licensee</u>	<u>Starting Date for Fee Payments¹⁴</u>	<u>Annual Amount</u>
Showtime/The Movie Channel	January 4, 1989	\$0.15 per subscriber
Home Box Office/Cinemax	January 1, 1989	\$0.15 per subscriber
Disney Channel	June 7, 1989	\$0.15 per subscriber
Playboy	March 3, 1989	\$0.15 per subscriber
SportsChannel/Prism	March 6, 1989	\$0.15 per subscriber
Bravo	March 8, 1989	\$0.15 per subscriber
American Movie Classics	March 6, 1989	\$0.15 per subscriber
USA	August 11, 1988	.3% of gross revenues
Lifetime	September 23, 1988	.3% of gross revenues
Discovery	November 22, 1988	.3% of gross revenues
CBN	November 22, 1988	.3% of gross revenues
Black Entertainment Network	November 29, 1988	.3% of gross revenues
Arts & Entertainment	December 14, 1988	.3% of gross revenues
MTV/VH1/Nickelodeon	January 4, 1989	[confidential material redacted]
Opryland (TNN)	February 10, 1989	[confidential material redacted]
Country Music	May 9, 1989	.7% of gross revenues
Turner	October 3, 1988	.3% of gross revenues

¹⁴ The Consent Decree provides that interim fees are to be awarded "from the date of the filing of such application for interim fee." (Article IX(B).) If, however, that application is filed before the effective date of the requested license, the interim fee should run from the starting date of the license, since the licensee is not authorized to use the ASCAP music until that date.

Insofar as payments are made on a per-subscriber basis, they are to be adjusted monthly based on the licensee's most recent subscriber figures. As for payments based on revenues, the parties are to attempt to agree on a schedule of payments for future fees; failing agreement, they may seek resolution of that question by the Court. All interim fees for music use prior to the issuance of this decision are to be paid within two weeks.

DATED: New York, New York
October 12, 1989

SO ORDERED.



MICHAEL H. DOLINGER
UNITED STATES MAGISTRATE

Copies of the foregoing Redacted Memorandum and Order have been transmitted this date to:

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1987 Nashville Network Rates

	<u>BMI</u>	<u>ASCAP</u>
Ratio:	55%	45%

Memorandum

Exhibit No. B-26R

HPMorrison:mct

DATE: November 22, 1966

File: 60-22-22

TO : Donald F. Turner
Assistant Attorney General
Antitrust Division

FROM : Hugh P. Morrison, Jr.
General Litigation Section

SUBJECT: United States v. Broadcast Music, Inc.,
et al. 64 Civ. 3787 (S.D. N.Y.)

Agreement has been reached on the BMI Consent Judgment; the Stipulation will be filed with Judge McLean on Tuesday, November 22, 1966. I have prepared the following on the background of the BMI case, the theory of the case, and the events leading to the Proposed Final Judgment.

I suppose the "BMI Investigation" began in 1941, immediately after the radio broadcasting industry formed BMI, when Thurman Arnold filed a complaint charging somewhat the same offense as does the present complaint. The 1941 complaint charged BMI and the co-conspirator networks with conspiring to monopolize the business of licensing performance rights to broadcasters. As you know, the networks and the National Association of Broadcasters were the prime movers in the creation of BMI. The complaint charged, inter alia, that the networks had coerced affiliated stations into buying stock in BMI, and forced each affiliate to also obtain a blanket license from BMI. A Consent Judgment was filed at the time of the filing of the complaint. The suit is often considered to have been a "friendly" suit, since these events occurred during ASCAP's heyday, and the Department supposedly did everything possible to insure BMI's success against the monopolistic ASCAP.

Between 1941 and the 1950's ASCAP's market position steadily declined, while BMI slowly but surely gained a real foothold in the acquisition and licensing of performance rights. ASCAP, of course, was limited by its decree, while BMI was free to operate almost without restriction. By the early 1950's BMI had assembled a catalog of all types of music, but concentrated its efforts in the fields of "rock and roll" and "Country and Western" tunes -- music which ASCAP, as a "dignified" membership organization, frowned upon. Understandably, Irving Berlin, for example, preferred not to be associated with composers of such tunes as "Hound-Dawg" and other equally barbaric musical compositions. But the 1940's were the years of the Big Band sound -- ASCAP music -- and BMI's catalog, despite its size, enjoyed somewhat limited

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popularity. During this period, 1941-1952, the broadcasters, as BMI stockholders, made a determined effort to promote BMI music. The National Association of Broadcasters, headed by the same individual who served as president of BMI, encouraged all broadcasters to play BMI music. During this period the broadcasters probably did in fact, as our present complaint alleges, "favor and promote" BMI music. These promotional efforts are evidenced by minutes of the NAB meetings, and in various materials published by BMI. (There is not, however, any evidence that the broadcasters promoted BMI music "to the exclusion of all other music," as we alleged in the present complaint.)

In the early 1950's the Big Band sound started to fade, and rock and roll, Country & Western, and rhythm and blues music started on the road to its present popularity. This, of course, resulted in increased performances of BMI tunes. As BMI's position strengthened, ASCAP's of course, correspondingly dwindled. The broadcasters complained bitterly that they were using less ASCAP music, yet ASCAP continually sought higher license fees. Licensees then began point to increased use of BMI music in an effort to drive down ASCAP's rates. At about this point, 1952, the "BMI Investigation" began anew, and continued until the present complaint was filed in December 1964. ASCAP, of course, initiated the investigation, charging that BMI's increased market position stemmed directly from a conspiracy among BMI and its broadcaster shareholders to favor BMI music, and to exclude ASCAP music. Between 1952 and 1964 ASCAP submitted numerous memoranda complaining of BMI's activities, while BMI, in turn, submitted equally voluminous materials in defense of their position.

ASCAP's complaint during this period was concentrated in two specific areas. First, they insisted that broadcasters excluded ASCAP music, and favored and promoted BMI. However, throughout this period ASCAP was unable to point to a single instance of actual exclusion, or a single instance of a specific broadcaster actually favoring BMI music. These complaints merely stated the obvious: BMI is owned by broadcasters. BMI music has become increasingly popular. Therefore, broadcasters favor BMI music and exclude all other music. To further support this somewhat dubious logic, ASCAP repeatedly pointed to BMI's promotional efforts, and the statements of the NAB in the 1940's in which the use of BMI music had been encouraged by the Association.

The second facet of ASCAP's complaint centered around the problem of "Guarantees" and "advances." Basically, ASCAP complained that BMI, aided by the "deep pocket" provided by the broadcasting industry, had embarked upon a scheme to raid ASCAP's better members by offering lump sum payments to these writers upon becoming affiliated with BMI. Subsequent events proved this allegation to be true, since BMI had, in

fact, granted substantial guarantees and advances to certain television theme and background music writers in an effort to break into the television field. While the legal significance of this course of conduct may be uncertain, the impact upon ASCAP was quite real. BMI contacted Screen Gems, for example, and offered substantial "guarantees" if Screen Gems, would affiliate its music publishing subsidiary with BMI, and agree to use BMI theme and background music in certain Screen Gems' television productions. These guarantees were non-returnable; that is, Screen Gems could retain the payment of, say, \$100,000, even if circumstances prevented the use of BMI music on "The Farmer's Daughter." (If, for example, a \$50,000 guarantee was paid in exchange for an agreement to use BMI music on a relatively new show, the payment would be retained even though the show was taken off the air in mid-season.) As a result of these contracts, BMI gained a real foothold in television music -- an area previously dominated almost completely by ASCAP. BMI abandoned this practice, with possibly a few insignificant exceptions, in the early 1960's. And finally, ASCAP complained that in at least one instance, an individual (aswell-known writer-publisher) agreed to devote his personal promotional efforts to BMI music, despite the fact that he also owned an ASCAP publishing firm. (It is not uncommon for one person to own and operate a BMI house and at the same time an ASCAP house.)

During the time ASCAP presented these complaints to the Antitrust Division they also sought Congressional help. (See House Report No. 607, 85th Congress, 1st Session [Celler Committee Report] and Hearings before the Subcommittee on Communications, Interstate & Foreign Commerce Committee, 85th Congress, 2d Session, on S.2834, March-July 1958.) Testimony before the Congressional Committees parallels the information submitted to the Department during this period. These hearings set out the manner in which BMI was formed by the broadcasters, the promotional efforts of the networks and the NAB in the early years (1940-1950), the promotional efforts of BMI itself, and the one or two instances wherein a disc jockey had publicly stated that the broadcasting industry should lend support to BMI by playing more BMI music. The first presentation was before the Celler Committee, which concluded in its report (1957) that the Antitrust Division should investigate the performance rights licensing field to determine "whether the antitrust laws have been or are being violated." The second presentation occurred shortly thereafter, in connection with S.2834, a bill which would "provide that a licensee for a radio or television broadcasting station shall not be granted to, or held by, any person . . . engaged directly or indirectly in the business of publishing music" This bill would have prevented broadcaster ownership of BMI, and ASCAP again leveled its charges

against BMI and the broadcasting industry. But Congress again failed to take any action against BMI. These hearings did, however, frighten the networks, for they soon divested themselves of all stock ownership in BMI. This occurred in the late 1950's, or perhaps in early 1960. This left BMI ownership scattered in the hands of some 500 individual radio and television station owners -- many of whom did not even realize that they owned stock in BMI. (After the original stock offering, BMI stock normally passed with the assets of the radio station. Thus, after 25 years, with many of the original stockholder-stations changing ownership several times, some broadcasters are not aware that they owned stock. As a result, BMI does not even have an accurate list of stockholders.)

I do not know the extent to which the Division undertook to conduct the investigation recommended by the Celler Committee in 1957. However, I do know that through ASCAP's efforts a case against BMI was presented to, and rejected by, every Assistant Attorney General who served between 1957 and 1963.

The fact memo and complaint were prepared sometime in 1963, and after numerous revisions, approved by the AAG in late 1963 or early 1964. The complaint was again held up in the AG's office for several months, and after further revisions, was filed in December 1964. (A copy of the complaint is attached hereto.)

The complaint basically charged that BMI and its 517 stockholders engaged in a "combination" and attempt to monopolize the business of acquiring performance rights, and licensing these performance rights to broadcasters. Since the complaint sought only to force BMI's broadcaster-shareholders to divest BMI stock, it was necessary to join the 517 stockholders. Thus, the suit was brought as a class action against all stockholders, naming RKO General, Inc., as defendant representative of the class.

At the time of the filing of the complaint BMI had reached a dominant position in certain fields of music, as reported on the various popularity charts. In the field of "popular music," which means rock & Roll for the most part, BMI enjoyed about 80% of the "market," with similar percentages in the fields of Country & Western, Rhythm & Blues and Latin music. Thus, the complaint alleged that as a result of the "combination" of BMI and the broadcasters to favor and promote BMI music, BMI had achieved a dominant position in these various fields of music used by broadcasters. Unfortunately,

1980

Best Song: "Fame"

Composer: Michael Gore

1981

Best Song: "Arthur's Theme"

Composers: Peter Allen, Carole Bayer Sager, Burt Bacharach*, and Christopher Cross*

1982

Best Score: "E.T. /Extra Terrestrial"

Composer: John Williams

1982

Best Song: "Up Where We Belong"

Composer: Will Jennings

1982

Best Score Adaptation: "Victor/Victoria"

Composer: Leslie Bricusse, Henry Mancini*

1985

Best Score: "Out Of Africa"

Composer: John Barry

1986

Best Score: "Round Midnight"

Composer: Herbie Hancock

1987

Best Score: "The Last Emperor"

Composers: Ryuichi, (JASRAC), Cong Su (GEMA), David Byrne*

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the complaint was filed without first obtaining any hard facts to support the existence of any real exclusionary practices on the part of the BMI stockholders. Like ASCAP's submissions to the Department, our complaint was based almost entirely upon three facts: (1) BMI is owned by broadcasters; (2) BMI has attained a dominant position in certain fields of music; and (3) Broadcasters play music. And finally, no theory had been developed either before or after the case was filed.

After the case was filed we began the investigation -- hoping to uncover evidence to support the complaint. During the entire period 1941-1964 we have never received a complaint from a BMI writer, nor had we ever received a complaint from a BMI licensee -- nor could we locate a disgruntled BMI affiliate after the complaint was filed. And despite ASCAP's insistence that broadcasters excluded ASCAP music, we never received a specific instance of exclusion by any broadcaster throughout the fifteen year period 1950-1965. Finally, our post-complaint investigation revealed that ASCAP's assertions concerning BMI's "market" position were somewhat inaccurate. (We did not conduct an independent study before the complaint was filed. We inserted in the complaint figures supplied by ASCAP.) The complaint alleged that BMI had attained a dominant position in various fields of music broadcast by radio broadcasters. Yet the percentage figures used in the complaint were based upon popularity polls compiled not through radio performances, but instead, through record and sheet music sales. The only accurate measure of the percentage of air time devoted to either ASCAP or BMI is through radio station logs and the surveying methods conducted by BMI and ASCAP themselves. These methods disclose that BMI presently licenses only about 45% of all music played on radio, with ASCAP accounting for about 50%, the Sesac, Inc., and the public domain accounting for the remaining five per cent.

After the filing of the complaint, defendant BMI served voluminous Interrogatories on the Government, seeking the evidence we intended to use to support each of the allegations in the complaint. We were, of course, unable to answer these Interrogatories, since we had no evidence to support many allegations in the complaint. Defendants then moved to dismiss these allegations from the complaint -- which, if granted, would have terminated the case. Judge Edward C. McLean refused to grant the dismissal, but stated, in a written memorandum opinion: "It is harder to understand plaintiff's ignorance of any facts to support some of the allegations of its complaint. These allegations would appear to have been based only on surmise or suspicion." He then ruled that we must answer these Interrogatories within six months, or these allegations would be dismissed. In the meantime, we had served both Interrogatories and a Rule 34 motion upon BMI, hoping to uncover some of the much-needed

evidence from the defendant. We were, however, almost certain that the evidence we needed did not exist -- i.e., evidence that broadcasters excluded ASCAP music, that recording companies excluded ASCAP music, etc. -- because of inducements offered by BMI and its broadcaster-shareholders

Immediately following the problem with answers to Interrogatories, the defendants moved to dismiss the case insofar as it purported to be a class suit. This motion was first set for argument in April 1966, but because of the revisions in Rule 23, the parties agreed to wait until after the new rule became effective. Thus, argument was re-scheduled for September 1966. By this time we had pretty well decided that we could proceed only on a sort of "vertical integration" theory -- i.e., broadcaster ownership of a major supplier, BMI was unlawful without more. As unattractive as this theory seems, it was our only alternative since we were almost certain by that time that we would never obtain any specific evidence to support the "behaviorial" allegations in the complaint. But any doubt about our theory was eliminated upon the filing of the class action motion, for that motion forced us into the "vertical integration" position. Defendants' motion papers revealed, as we already knew, that some members of the "class do not even play music -- they are the so-called "all news" stations. Other because of a "good music" format, use as much as 70-90 per cent ASCAP music. Thus, the defendants argued, it could hardly be said that these members of the class "favor and promote BMI to the exclusion of all other music" as alleged in the complaint.

Obviously, the only real common denominator among the members of the class was the fact that each member owned stock in BMI. Once we attempt to go beyond that point we no longer have a class. If we argued that the violation required more than mere stock ownership, we would have been compelled to prove that every member of the class engaged in such additional conduct. In other words, if we went beyond the per se vertical integration theory we would have encountered the problem that would arise if one were to charge a class of defendants with engaging in a conspiracy to fix prices. Obviously, this would be an inappropriate class action, since it is necessary to prove that each defendant did, in fact, participate in the conspiracy. Thus, at least for purposes of the class action motion we had to argue that stock ownership, standing alone, presented a sufficient common question of law to support the action as a class action.

At this point it was determined that we should not proceed under the "vertical integration" theory. In the absence of any real anti-competitive effects we would really be arguing that broadcaster ownership of BMI constitutes a per se offense. It was suggested by Mr. Breyer that we dismiss the vertical aspects of the case. No one disagreed.

We might have been able to prove that some broadcasters did in fact favor and promote BMI music (but hardly "to the exclusion of all other music," as the complaint alleges). Compliance by defendant BMI with our discovery motions may have revealed isolated instances of such conduct. But even Judge McLean questions the legal significance of such promotional efforts, stating at one point that it is entirely logical that BMI should attempt to induce its stockholders to promote BMI music, and equally logical that these broadcaster-stockholders should do so.

Even if we had some evidence to support the complaint I would be inclined to recommend that it be dismissed. The way the case has been pleaded I am afraid we would be forced to continue to adhere to a type of "vertical integration" theory, which seem inappropriate to me. There has been no merger; there has been instead internal expansion. Moreover, this internal expansion occurred in a market theretofore occupied by only a single supplier - ASCAP. As a result, music users now enjoy intense competition between ASCAP and BMI. No BMI writers or publishers have ever complained, and ASCAP writers complain that BMI writers fare better, but seldom does a writer leave ASCAP for BMI.

In summary, we abandoned the divestiture theory, and entered into the consent judgment because:

(1) Too many of BMI's stockholders do not, in fact favor and promote BMI music. Because of radio station formats many stations may actually "favor" ASCAP music. Nor do television stations favor and promote BMI music. As you know, most television programming is of network origin; the individual stations could not favor BMI music to any significant degree even if they wanted to. And the networks, who chose the music, are not BMI stockholders.

To argue that BMI stockholders, as a class under Rule 23, "favor and promote BMI music to the exclusion of all other music" is both legally and factually absurd.

(2) Much of the evidence that we do have in support of the complaint is from 15 to 25 years old.

(3) The front office has determined that we should not proceed on a vertical theory.

Attachment

Comparison of Total License Fees^{1/}

	<u>BMI</u>	<u>ASCAP</u>
1987	\$199,335,000	\$280,807,000
	<hr/>	<hr/>
Ratio:	41.5%	58.5%
1988	216,702,000	290,987,000
	<hr/>	<hr/>
Ratio:	42.7%	57.3%

1 The BMI figures are actual calendar year fees, as opposed to the average of fiscal years computations presented in Exhibit No. B-1. The 1987 figures for both BMI and ASCAP include retroactive fees paid by television licensees for portions of 1987. ASCAP's 1987 fees also reflect the subtraction of retroactive fees paid to ASCAP by radio licensees for prior years.

OSCAR WINNERS
LICENSED BY BMI DURING
1987

1960

Best Song "Never On Sunday"

Composers: Manos Hadjidakis (SACEM), Billy Towne

1962

Best Score: "Lawrence of Arabia"

Composer: Maurice Jarre (SACEM)

1964

Best Song: "Chim-Chim-Cher-ee"

Composers: Richard M. Sherman, Robert B. Sherman

1964

Best Score: "Mary Poppins"

Composers: Richard M. Sherman, Robert B. Sherman

1966

Best Score: "Born Free"

Composer: John Barry

1967

Best Song: "Talk To The Animals"

Composer: Leslie Bricusse

1968

Best Score: "The Lion In The Winter"

Composer: John Barry

1969

Best Score of a Musical: "Hello Dolly"

Composer: Lionel Newman

1970

Best Song: "For All We Know"

Composer: James Griffin, Fred Karlin*, Robb Wilson*

1970

Best Original Song: "Let It Be"

Composers: John Lennon (PRS) and Paul McCartney (PRS)

1971

Best Score Adaptation: "Fiddler On The Roof"

Composer: John Williams

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1971

Best Song: "Theme From Shaft"

Composer: Isaac Hayes

1972

Best Song: "The Morning After"

Composer: Joel Hirschhorn, Al Kasha*

1974

Best Song Score and/or Adaptation: "The Great Gatsby"

Composer: Nelson Riddle

1974

Best Song: "We May Never Love Like This Again"

Composer: Joel Hirschhorn, Al Kasha*

1975

Best Score: "Barry Lyndon"

Composer: Leonard Rosenman

1975

Best Score: "Jaws"

Composer: John Williams

1976

Best Score Adaptation: "Bound For Glory"

Composer: Leonard Rosenman

1976

Best Score: "The Omen"

Composer: Jerry Goldsmith

1977

Best Score: "Star Wars"

Composer: John Williams

1978

Best Song: "Last Dance"

Composer: Paul Jabara

1978

Best Score: "Midnight Express"

Composer: Giorgio Moroder (SUISA)

1979

Best Song: "It Goes Like It Goes"

Composers: Norman Gimbel, David Shire

1980

Best Score: "Fame"

Composer: Michael Gore

GRAMMY AWARD WINNERS
LICENSED BY BMI DURING
1987

1959 GRAMMY WINNERS:

Song Of The Year: "The Battle of New Orleans"
Composer: Jimmy Driftwood

1960 GRAMMY WINNERS:

Best Jazz Composition: "Sketches of Spain"
Composers: Miles Davis, Gil Evans

1962 GRAMMY WINNERS:

Song Of The Year: "What Kind of Fool Am I"
Composer: Leslie Bricusse, Anthony Newley (PRS)

Best Original Jazz Composition: "Cast Your Fate To The Winds"
Composer: Vince Guaraldi

1963 GRAMMY WINNERS:

Best Instrumental Theme: "More" (Theme From "Mondo Cane")
Composers: Norman Newell (PRS), Nino Oliviero (SIAE), Marcello Ciorciolini (SIAE)
Riziero Ortolani (SIAE)

Best Original Jazz Composition: "Gravy Waltz"
Composers: Steve Allen, Ray Brown

Best Score From An Original Cast Show Album: "She Loves Me" (Original Cast)
Composers: Jerry Bock, Sheldon Harnick

1964 GRAMMY WINNERS:

Best Original Jazz Composition: "The Cat"
Composer: Lalo Schifrin

Best Original Score Written For A Motion Picture or TV Show: "Mary Poppins"
Composers: Richard M. Sherman and Robert B. Sherman

Best Country and Western Song: "Dang Me"
Composer: Roger Miller

1965 GRAMMY WINNERS:

Best Original Jazz Composition: "Jazz Suite On the Mass Texts"
Composer: Lalo Schifrin

Best Country and Western Song: "King of the Road"
Composer: Roger Miller

1966 GRAMMY AWARD WINNERS:

Song of the Year: "Michelle"
Composers: John Lennon and Paul McCartney (PRS)

Best Country and Western Song: "Almost Persuaded"
Composers: Bill Sherrill, Glen Sutton

1967 GRAMMY AWARD WINNERS:

Song Of The Year: "Up Up and Away"
Composer: Jim Webb

Best Instrumental Theme: "Mission Impossible"
Composer: Lalo Schifrin

Best Original Score Written For A Motion Picture or TV Show: "Mission Impossible"
Composer: Lalo Schifrin

Best Score From an Original Cast Show Album: "Cabaret"
Composers: Fred Ebb, John Kander

Best Country and Western Song: "Gentle On My Mind"
Composer: John Hartford

1968 GRAMMY AWARD WINNERS:

Best Rhythm and Blues Song: "Sitting On The Dock Of The Bay"
Composers: Otis Redding, Steve Cropper

Best Instrumental Theme: "Classical Gas"
Composer: Mason Williams

Best Original Score Written For A Motion Picture or TV Special: "The Graduate"
Composer: Paul Simon
Additional Music: Dave Grusin

1969 GRAMMY AWARD WINNERS:

Song Of The Year: "Games People Play"
Composer: Joe South

Best Contemporary Song: "Games People Play"
Composer: Joe South

Best Rhythm And Blues Song: "Color Him Father"
Composer: Richard Spencer

Best Country Song: "A Boy Named Sue"
Composer: Shel Silverstein

Best Instrumental Theme: "Midnight Cowboy"
Composer: John Barry

1970 GRAMMY AWARD WINNERS:

Song Of The Year: "Bridge Over Troubled Water"
Composer: Paul Simon

Best Contemporary Song: "Bridge Over Troubled Water"
Composer: Paul Simon

Best Rhythm And Blues Song: "Patches"
Composers: Ronald Dunbar, General Johnson

Best Country Song: "My Woman, My Woman, My Wife"
Composer: Marty Robbins

Best Original Score Written For A Motion Picture or TV Special: "Let It Be"
Composers: John Lennon, Paul McCartney, George Harrison, Ringo Starr (all PRS)

1971 GRAMMY AWARD WINNERS:

Best Rhythm and Blues Song: "Ain't No Sunshine"
Composer: Bill Withers

Best Country Song: "Help Me Make It Through The Night"
Composer: Kris Kristofferson

Best Original Score Written For A Motion Picture: "Shaft"
Composer: Isaac Hayes

1972 GRAMMY AWARD WINNERS:

Song Of The Year: "The First Time Ever I Saw Your Face"
Composer: Ewan MacColl (PRS)

Best Rhythm and Blues Song: "Papa Was A Rolling Stone"
Composers: Barrett Strong, Norman Whitfield

Best Country Song: "Kiss An Angel Good Mornin'"
Composer: Ben Peters

Best Score From An Original Cast Show Album: "Don't Bother Me, I Can't Cope"
Composer: Micki Grant

1973 GRAMMY AWARD WINNERS:

Song Of The Year: "Killing Me Softly With His Song"
Composer: Norman Gimbel, Charles Fox

Best Country Song: "Behind Closed Doors"
Composer: Kenny O'Dell

Best Instrumental Composition: "Last Tango In Paris"
Composer: Gato Barbiero

1974 GRAMMY AWARD WINNERS:

Best Country Song: "A Very Special Love Song"
Composers: Norro Wilson, Billy Sherrill

Best Score From The Original Cast Show Album: "Raisin"
Composers: Judd Woldin, Robert Brittan

1975 GRAMMY AWARD WINNERS:

Best Rhythm and Blues Song: "Where Is The Love"
Composers: Harry Wayne Casey, Willie Clarke, Betty Wright

Best Country Song: " (Hey Won't You Play) Another Somebody Done Somebody Wrong Son"
Composers: Chips Moman, Larry Butler

Album Of Best Original Score Written For A Motion Picture or TV Special: "Jaws"
Composer: John Williams

Best Cast Show Album: "The Wiz"
Composer: Charlie Smalls

1976 GRAMMY AWARD WINNERS:

Song Of The Year: "I Write The Songs"
Composer: Bruce Johnston

Best Country Song: "Broken Lady"
Composer: Larry Gatlin

Best Instrumental Composition: "Bellavia"
Composer: Chuck Mangione

Album of Best Original Score Written For A Motion Picture or TV Special: "Car Wash"
Composer: Norman Whitfield

1977 GRAMMY AWARD WINNERS:

Best Rhythm and Blues Song: "You Make Me Feel Like Dancing"
Composer: Vini Poncia, Leo Sayer*

Best Instrumental Composition: "Main Title From Star Wars"
Composer: John Williams

Best Original Score Written For A Motion Picture or TV Special: "Star Wars"
Composer: John Williams

1978 GRAMMY AWARD WINNERS:

Best Rhythm and Blues Song: "Last Dance"
Composer: Paul Jabara

Best Instrumental Composition: Theme From "Close Encounters Of The Third Kind"
Composer: John Williams

Best Album Of Original Score Written For A Motion Picture or TV Special:
"Close Encounters Of The Third Kind"
Composer: John Williams

1979 GRAMMY AWARD WINNERS:

Best Rhythm And Blues Song: "After The Love Has Gone"
Composer: David Foster, Bill Champlin*, Jay Graydon*

Best Album of Original Score Written For A Motion Picture or TV Special: "Superman"
Composer: John Williams

1980 GRAMMY AWARD WINNERS:

Best Rhythm and Blues Song: "Never Knew Love Like This Before"
Composer: Reggie Lucas, James Mtume

Best Country Song: "On The Road Again"
Composer: Willie Nelson

Best Instrumental Composition: "The Empire Strikes Back"
Composer: John Williams

Best Album Score Written For A Motion Picture Or TV Special: "The Empire Strikes Back"
Composer: John Williams

1981 GRAMMY AWARD WINNERS:

Song Of The Year: "Bette Davis Eyes"
Composer: Donna Weiss, Jackie DeShannon*

Best Country Song: "9 to 5"
Composer: Dolly Parton

Best Instrumental Composition: The Theme From "Hill Street Blues"
Composer: Mike Post

Best Original Score Written For A Motion Picture or TV Special: "Raiders Of The Lost Ark"
Composer: John Williams

1982 GRAMMY AWARD WINNERS:

Song Of The Year: "Always On My Mind"
Composers: Johnny Christopher, Mark James, Wayne Carson

Best Country Song: "Always On My Mind"
Composers: Johnny Christopher, Mark James, Wayne Carson

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Best Instrumental Composition: "Flying" (Theme From E.T. The Extra-Terrestrial)
Composer: John Williams

Best Album of Original Score Written For A Motion Picture or TV Special:
"E.T. The Extra-Terrestrial" (Music From The Original Motion Picture Soundtrack)
Composer: John Williams

Best Cast Show Album: "Dream Girls"
Lyricist: Tom Eyen, Henry Krieger*

1983 GRAMMY AWARD WINNERS:

New Song Of The Year: "Every Breath You Take"
Composer: Sting (PRS)

Best New Rhythm and Blues Song: "Billie Jean"
Composer: Michael Jackson

Best Album of Original Score Written For A Motion Picture Or TV Special: "Flash Dan"
Composers: Shandi Sinnamon, Ronald Magness, Douglas Cotler, Richard Gilbert,
Michael Boddicker, Craig Kampf

1984 GRAMMY AWARD WINNERS:

Song of The Year: "What's Love Got To Do With It"
Composer: Graham Lyle (PRS), Terry Britten*

Best Instrumental Composition: "Olympic Fanfare and Theme"
(Track from "The Official Music of the XXII Olympiad at Los Angeles")
Composer: John Williams

1985 GRAMMY AWARD WINNERS:

Song Of The Year: "We Are The World"
Composer: Michael Jackson, Lionel Richie*

Best Rhythm and Blues Song: "Freeway Of Love"
Composer: Jeffrey Cohen, Narada Michael Walden*

Best Album Of Original Score Written For A Motion Picture Or TV Special:
"Beverly Hills Cop"
Composers: Jon Gilutin, Bunny Hull, Hawk, Micki Free, Sue Sheridan, Howie Rice,
Allee Willis

1986 GRAMMY AWARD WINNERS

Song Of The Year: "That's What Friends Are For"
Composer: Carole Bayer Sager, Burt Bacharach*

Best Rhythm and Blues Song: "Sweet Love"
Composer: Anita Baker, Gary Bias*, Louis Johnson*

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Best Instrumental Composition: "Out Of Africa" (Music from the Motion Picture Soundtrack)
Composer: John Barry

1987 GRAMMY AWARD WINNERS:

Song Of The Year: "Somewhere Out There"
Composers: Barry Mann, Cynthia Weil, James Horner*

Best Original Score Written For A Motion Picture Or TV Special: "Somewhere Out There"
Composers: Barry Mann, Cynthia Weil, James Horner*

Best Country and Western Song: "Forever and Ever Amen"
Composer: Paul Overstreet, Don Schlitz*

Best Instrumental Composition: "Call Sheet Blues"
Composers: Wayne Shorter, Herbie Hancock, Ron Carter, Billie Higgins*

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BMI PULITZER PRIZE
WINNERS LICENSED BY BMI
DURING 1987

1947

SYMPHONY NO. 3

Composer: Charles Ives

1954

CONCERTO CONCERTANTE FOR TWO PIANOS AND ORCHESTRA

Composer: Quincy Porter

1960

FIORIELLO!

Composers: Jerry Bock, Sheldon Harnick

STRING QUARTET NO. 2

Composer: Elliott Carter

1961

SYMPHONY NO. 7

Composer: Walter Piston

1962

THE CRUCIBLE

Composer: Robert Ward

1966

VARIATIONS FOR ORCHESTRA

Composer: Leslie Bassett

1967

STRING QUARTET NO. 3

Composer: Leon Kirchner

1969

STRING QUARTET NO. 3

Composer: Karel Jusa

1970

TIME'S ENCOMIUM

Composer: Charles Wuorinen

1971

SYNCHRONISMS NO. 6

Composer: Mario Davidovsky

1973

STRING QUARTET NO. 3

Composer: Elliott Carter

1974

NOTTURNO

Composer: Donald Martino

SPECIAL CITATION FOR LIFE'S WORK

Composer: Roger Sessions

1976

A CHORUS LINE

Composers: Ed Kleban, Marvin Hamlisch*

SPECIAL CITATION FOR LIFE'S WORK

Composer: Scott Joplin

1979

AFTERTONES OF INFINITY

Composer: Joseph Schwantner

1982

CONCERTO FOR ORCHESTRA

Composer: Roger Sessions

SPECIAL CITATION FOR LIFE'S WORK

Composer: Milton Babbitt

1983

THREE MOVEMENTS FOR ORCHESTRA

Composer: Ellen Taaffe Zwilich

1984

CANTI DEL SOLE

Composer: Bernard Rands

1987

FLIGHT INTO EGYPT

Composer: John Harbison

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MUSIC IN THE 37 TOP SYNDICATED PROGRAMS
RANKED BY THE A.C. NIELSEN CO.
NOVEMBER 1987 CASSANDRA REPORT

THEME

Number of shows with 100% BMI Writers.....20
Number of shows with BMI & ASCAP Writers.....1
Number of shows with no BMI Writers.....14

Not evaluated (Big 10 Football, Southwest Conference
Football).....2

<u>SCORE (Major Background Works)</u>	<u>BMI</u>	<u>ASCAP</u>
Number of shows with score 100% of background music	**5	6
Number of shows with score greater than 75% of background music	6	2
Number of shows with score greater than 50% of background music	3	1
Number of shows with score less than 50% of background music	*4 1/2	1/2

Unable to evaluate.....9

* One show had score shared by a BMI Writer and an ASCAP
Writer

** No ASCAP data - Gave ASCAP credit for score to be 100%
of background music even though it
could be less:

People's Court
Cheers
Small Wonder
Judge
Webster

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing
Rebuttal Case of Broadcast Music, Inc. was served on this
10th day of January, 1990, via first-class mail, postage
prepaid, to the American Society of Composers, Authors and
Publishers at the following address:

Bernard Korman, Esq.
ASCAP
One Lincoln Plaza
New York, New York 10023



Joseph J. DiMona, Esq.